SUPREME COURT

BOARD OF BAR EXAMINERS' DECISIONS

1993-2003

Case	Decided Date	Tab No.
Applicant No. 009 to the 2002 Delaware Bar Examination (No. 61, 2003)	Oct. 20, 2003	1.
In the Matter of: Nicole C. Kennedy (No. 668, 2002)	April 28, 2003	2.
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In re Petition of Sharon Ann Ziegler to the Delaware Bar (Applicant No. 42) (No. 438, 1993)	Jan. 3, 1994	17.
In re Petition of Christopher R. Locke to the Delaware Bar (Applicant No. 39) (No. 460, 1993)	Dec. 30, 1993	18.

(Cite as: 2003 WL 22416043 (Del.Supr.))

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court of Delaware.

APPLICANT NO. 009 TO THE 2002 DELAWARE BAR EXAMINATION,
Applicant Below-
Appellant,
v.
BOARD OF **BAR EXAMINERS** OF THE DELAWARE SUPREME COURT, Examiner Below-Appellee.

No. 61,2003.

Submitted Sept. 9, 2003.
Decided Oct. 20, 2003.

Before VEASEY, Chief Justice, HOLLAND, BERGER, STEELE, and JACOBS, Justices, constituting the Court en Banc.

ORDER

*1 This 20th day of October 2003, upon consideration of the parties' briefs and oral argument, it appears to the Court that:

(1) The applicant was Applicant No. 9 taking the 2002 Delaware Bar Examination. The **Board** of **Bar Examiners** informed the applicant on October 17, 2002, that he had failed the examination. A total scaled scored of 145 is required to pass the examination. The applicant's total scaled score on the examination was 138.12. In accordance with **Board** of **Bar Examiners** Rule 19, the applicant requested and received copies of two of the Delaware law essay questions, the applicant's answers, and two representative answers for each question. Thereafter, the applicant requested the Board to re-grade his response to essay question number two. [FN1] The Board notified the applicant that the score was final and not subject to re-grading or other review. [FN2] This petition followed.

FN1. The applicant received a raw score of 20 on question two.

FN2. DEL. BD. BAR EXAMINERS' R. 29 (2003) (providing that "any decisions of the Board with respect to a specific grade or grades assigned to any individual applicant, once posted according to Rule 16, are final and not subject to review by the Board.").

(2) In the opening brief in support of the applicant's petition, his sole argument is that the score awarded for question 2 was arbitrary. The applicant asserts that this arbitrary score constituted an abuse of the **Board** of **Bar Examiners**' discretion and resulted in manifest injustice to him. The Board responds that this Court approved the procedures for grading and scaling the scores of the bar examination. By following the approved procedures, the Board asserts that it did not act in a fraudulent, arbitrary or unfair manner.

(3) The Board further asserts that: (a) because the applicant's substantial rights have not been affected, since he may apply to sit for the bar examination again, the applicant is not entitled to review; [FN3] (b) Supreme Court Rule 52(f) precludes review of the Board's grading determinations and is not manifestly unfair; and (c) even if the applicant were to receive an additional 50 points for question two, he would nevertheless not receive a passing bar examination grade.

FN3. *See id.* R. 28 ("There shall be no limitations on the number of times an applicant may apply to take the Bar Examination.").

(4) Having carefully considered the parties'

respective positions, we find it manifest that the petition must be dismissed. Supreme Court Rule 52(f) is clear: "Any person aggrieved by final action of the Board may appeal to the Court for relief if such action affects the substantial rights of the person claimed to be aggrieved, except that decisions of the Board with respect to a specific grade or grades assigned to any individual applicant are final and shall not be subject to review by the Court."

(5) It is not necessary in this case to reexamine the validity of the provisions of Supreme Court Rule 52(f). The applicant's substantial rights have not been violated because the additional 50 points to which he claims entitlement would not have been sufficient for applicant to pass. Moreover, the applicant has the right to apply to sit for the bar examination again. [FN4] In addition, there is nothing to support a finding that the Board acted in a fraudulent, arbitrary or unfair manner. [FN5]

FN4. *See In re Rubenstein,* 637 A.2d 1131, 1134 (Del.1994) (holding that petitioner's substantial rights were affected because the Board's action precluded petitioner from "ever gaining admission to the Delaware Bar.").

FN5. *No. 26 v. **Board of Bar Examiners,*** 780 A.2d 252, 253 (Del.2001) (holding that an unsuccessful applicant to the Delaware Bar has no right to review of a Board decision "absent a claim that the Board acted in an arbitrary, fraudulent or unfair manner.")

NOW, THEREFORE, IT IS ORDERED that the petition is DISMISSED.

2003 WL 22416043 (Del.Supr.), Unpublished Disposition

END OF DOCUMENT

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In the Matter of: Nicole C. KENNEDY.

No. 668, 2002.

Submitted April 22, 2003.
Decided April 28, 2003.

Appeal from the **Board** of **Bar Examiners** of the State of Delaware.

Before VEASEY, Chief Justice, WALSH, HOLLAND, BERGER and STEELE, Justices, constituting the Court en Banc.

ORDER

**1 This 28th day of April, 2003, on consideration of the briefs of the parties, it appears to the Court that:

1) Nicole C. Kennedy, an unsuccessful bar applicant, appeals from a decision of the **Board** of **Bar Examiners** denying her request to review her answers to the 2002 Delaware Bar Examination. She contends that the absence of meaningful review of her test scores violates procedural and substantive due process under the Fourteenth Amendment to the United States Constitution.

2) This Court has repeatedly considered and rejected similar arguments, most recently in *Applicant No.26 v. Bd. of Bar Examiners,* [FN1] and we continue to find no violation of procedural or substantive due process in the manner in which the Delaware Bar Examination is graded and reviewed.

FN1. 780 A.2d 252 (Del.2001).

NOW, THEREFORE, IT IS ORDERED that the petition to review the decision of the **Board** of **Bar Examiners** is DENIED.

END OF DOCUMENT

Supreme Court of Delaware.

APPLICANT NO. 26 TO the 2000 DELAWARE BAR EXAMINATION, Applicant Below, Appellant,
v.
BOARD OF **BAR EXAMINERS** OF the DELAWARE SUPREME COURT, Examiner Below, Appellee.

No. 529, 2000.

Submitted: June 20, 2001.
Decided: Aug. 30, 2001.

State bar applicant who failed state bar examination for the second time filed petition for discovery and regrading of her exam. The Supreme Court held that: (1) applicant did not have right to a hearing or other review of Board's decision, and (2) elimination of Board rule which had permitted regrading of state bar examinations did not violate applicant's equal protection rights.

Petition refused.

West Headnotes

[1] Attorney and Client ⇐ 6
45k6 Most Cited Cases

The Supreme Court will not set aside the determination of the **Board** of **Bar Examiners** as to a bar applicant's professional competence unless the applicant demonstrates fraud, coercion, arbitrariness, or manifest unfairness.

[2] Attorney and Client ⇐ 6
45k6 Most Cited Cases

An aggrieved applicant to the state bar may appeal to the Supreme Court only if the action of the **Board** of **Bar Examiners** affected substantial rights. Sup.Ct. Rules, Rule 52(f).

[3] Attorney and Client ⇐ 6
45k6 Most Cited Cases

An applicant who may sit for the bar examination again has not suffered a deprivation of substantial rights, which would permit him or her to take an appeal to the Supreme Court. Sup.Ct. Rules, Rule 52(f).

[4] Attorney and Client ⇐ 6
45k6 Most Cited Cases

Aggrieved applicants who fail the state bar examination are not entitled to discovery absent a prima facie showing of impropriety, and they are not entitled to a hearing to challenge their test scores.

[5] Attorney and Client ⇐ 6
45k6 Most Cited Cases

Elimination of rule of **Board** of **Bar Examiners** which had permitted regrading of state bar examinations did not violate equal protection rights of bar applicant who failed state bar examination by less than three points, though bar applicants in prior years had been allowed to seek regrading of their answers; applicant was treated the same as all other applicants for that year's bar examination, and she had no constitutionally protected right to be treated same as applicants in prior years whose exams were governed by different rules. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law ⇐ 211(1)
92k211(1) Most Cited Cases

The Equal Protection Clause does not require identical treatment for all persons without recognition of differences in relevant circumstances. U.S.C.A. Const.Amend. 14.
***253** Upon appeal from decision of the **Board** of **Bar Examiners**. REFUSED.

David A. Boswell, of Schmittinger & Rodriguez, P.A., Rehoboth Beach, for Appellant.

Donald E. Reid, of Wilmington, for Appellee.

Before VEASEY, Chief Justice, WALSH, HOLLAND, BERGER and STEELE, Justices,

constituting the Court en Banc.

PER CURIAM:

In this appeal, we again consider whether an applicant who fails the Delaware Bar Examination is entitled to challenge her grade, either by petitioning the **Board** of **Bar Examiners** to regrade the exam or by proceedings in this Court. Following settled law, we hold that an unsuccessful applicant to the Delaware Bar has no right to a hearing or other review of the Board's decision absent a claim that the Board acted in an arbitrary, fraudulent or unfair manner. Applicant No. 26 has not made any such allegations with respect to the administration or grading of her Bar Examination. Accordingly, Applicant No. 26's petition for discovery and regrading is denied.

Factual and Procedural Background

Applicant No. 26 sat for the Delaware Bar Examination, for the second time, in July 2000. She was notified in October 2000 that she failed, with a total scaled score of 142.86. The minimum passing score was 145. Applicant No. 26 thereafter requested and received copies of her answers, the scores she received for each answer, and two representative passing answers for each question. Applicant No. 26 also requested her scoring sheets and information about the Board's scoring procedures. She explained that she intended to ask that her exam be regraded if she found any grading errors. The Board did not provide the applicant's scoring sheets and it advised her that, since the rule governing regrading was deleted in 1999, the Board's decision was final.

Discussion

Applicant No. 26 argues that the Board's procedures violated her federal constitutional rights to Due Process and Equal Protection of the laws. She says it is manifestly unfair, arbitrary and capricious to be told that she failed the Bar Examination without being given the information needed, or the opportunity, to challenge that determination. Applicant No. 26 suggests that there could have been a simple error in addition and that it will go uncorrected because the Board refuses to review its grades. Applicant No. 26 also points out that, under prior Board Rule 20, those who missed the passing score by a point or two sometimes gained the needed points during the regrading process permitted under that rule. Now that Rule 20 has been abolished, Applicant No. 26 complains that there is no mechanism to review what may have been faulty grading.

[1][2][3][4] It is settled law that "[t]his Court will not set aside the determination of the Board as to an applicant's professional competence unless the applicant demonstrates fraud, coercion, arbitrariness, or manifest unfairness." [FN1] In addition, an aggrieved applicant may appeal to this Court only if the Board's action affected "substantial rights." [FN2] It is equally settled law that an applicant who may sit for ***254** the Bar Examination again has not suffered a deprivation of "substantial rights." [FN3] Finally, aggrieved applicants are not entitled to discovery absent a *prima facie* showing of impropriety, [FN4] and they are not entitled to a hearing to challenge their test scores. [FN5]

FN1. *In re Petition of Rubenstein,* Del.Supr., 637 A.2d 1131, 1134 (1994).

FN2. Supr. Ct. R. 52(f).

FN3. *In re Petition of Delaney,* Del.Supr., 637 A.2d 826, 1994 WL 35489.

FN4. *In re Petition of Applicant No. 5,* Del.Supr., 658 A.2d 609, 613 (1995).

FN5. *In re Hudson,* Del.Supr., 402 A.2d 369 (1979)

.

[5] In short, Applicant No. 26's arguments about her due process rights, her right to know the "reasons" for the Board's decision that she failed the Bar Examination, and her right to obtain discovery from the Board have been rejected by this Court in the past and nothing in her arguments convinces us that our

precedents should be overturned. Applicant No. 26's only remaining argument is that the elimination of Board Rule 20 deprived her of Equal Protection under the 14th Amendment to the United States Constitution. She contends that, since bar applicants in prior years were allowed to seek a regrading of their answers, she, too, must be given that opportunity.

[6] Applicant No. 26's equal protection argument lacks merit. The Equal Protection clause does not "require identical treatment for all persons without recognition of differences in relevant circumstances." [FN6] The **Board** of **Bar Examiners'** Rules changed in 1999; thereafter, no regrading was permitted. Applicant No. 26 was treated the same as all other applicants for the 2000 Bar Examination when her request for regrading was denied. She has no constitutionally protected right to be treated the same as applicants in prior years whose examinations were governed by different rules. Her rights are fully protected by the opportunity to the take the Bar Examination again.

FN6. *Priest v. State,* Del.Supr., 227 A.2d 576, 579 (1967).

Conclusion

Based on the foregoing, pursuant to Supreme Court Rule 52(f), Applicant No. 26's petition is REFUSED.

780 A.2d 252

END OF DOCUMENT

(Cite as: 757 A.2d 1277, 2000 WL 1011079 (Del.Supr.))

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In re: Petition of Shawn S. DEVROUDE
(Examinee # 49)

No. 609 1999.

Submitted May 30, 2000.
Decided June 28, 2000.

Before VEASEY, Chief Justice, HARTNETT and BERGER, Justices.

ORDER

1 This 28th day of June, 2000, the Court having carefully considered Petitioner's request that he be admitted to the Bar of the State of Delaware notwithstanding his failure to achieve a passing grade with respect to all components of the 1999 Delaware Bar Examination or, in the alternative, that he be permitted to retake only the MBE portion of the 2000 Delaware Bar Examination; and having considered the submissions by Petitioner and the **Board of **Bar Examiners**; and having determined that the circumstances do not warrant a waiver of any of the Rules of the **Board** of **Bar Examiners**;

IT IS HEREBY ORDERED that Petitioner's alternative requests are denied.

757 A.2d 1277 (Table), 2000 WL 1011079 (Del.Supr.), Unpublished Disposition

END OF DOCUMENT

(Cite as: 741 A.2d 1026, 1999 WL 1254560 (Del.Supr.))

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In re Lorraine HARRIS, Respondent Below, Appellant,
v.
BOARD OF **BAR EXAMINERS** OF THE SUPREME COURT OF THE STATE OF DELAWARE,
Petitioner Below, Appellee.

No. 266, 1999.

Nov. 8, 1999.

Board of **Bar Examiners** Petition. No.1999-2.

ORDER

**1 This 8 th day of November 1999, the Clerk having issued a notice dated September 30, 1999, directing the appellant to show cause why this appeal should not be dismissed, pursuant to Supreme Court Rule 29(b), for appellant's failure to diligently prosecute the appeal by filing her opening brief and appendix; and appellant having failed to respond to the notice to show cause within the required ten-day period, dismissal of this action is deemed to be unopposed.

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rules 3(b) and 29(b), that the within appeal is DISMISSED.

741 A.2d 1026 (Table), 1999 WL 1254560 (Del.Supr.), Unpublished Disposition

END OF DOCUMENT

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In the Matter of APPLICANT NO. 46, Petitioner.

No. 525, 1997.

Submitted July 1, 1998.
Decided July 17, 1998.

Before VEASEY, Chief Justice, HARTNETT and BERGER, Justices.

ORDER

**1 This 17th day of July 1998, it appears to the Court that:

(1) Petitioner, Applicant No. 46, appeals the decision of the **Board** of **Bar Examiners** denying petitioner's petition for review filed pursuant to **Board** of **Bar Examiners** Rule 20. Petitioner passed the Multistate Bar Examination with a score of 148 and achieved a passing score on 8 of 12 essay questions. Petitioner failed, however, to achieve an average score of 65 on all the essay questions as required by Board Rule 13. Petitioner received an average score of 64.833 on the essay questions and failed the Bar Examination. The Petitioner seeks relief from this Court from the Board's ruling.

(2) By Order dated June 9, 1998, the Court remanded this appeal to the **Board** of **Bar Examiners** to respond on an expedited basis to a series of procedural questions. By letter memorandum dated June 18, 1998, the Board filed a response to the Court's questions.

(3) By letter dated June 25, 1998, the Clerk of this Court directed the petitioner to file a reply to the Board's response. The petitioner's reply was filed on July 1, 1998.

(4) This Court will not set aside the determination of the Board as to an applicant's professional competence unless the applicant shows fraud, coercion, arbitrariness or manifest unfairness. *In Re Reardon,* Del Supr., 378 A.2d 614, 618 (1977). Having considered the Board's response and the petitioner's reply, we conclude that the petitioner has not demonstrated the arbitrariness or unfairness necessary for this Court to interfere with the Board's decision. [FN*]

FN* While the Court is sensitive to the disappointment of applicants whose scores fall short of the required passing score, we recognize that in any test there must be a passing line. *In Re Fischer,* Del.Supr., 425 A.2d 601 (1981). Accordingly, this Court has affirmed decisions regarding applicants whose essay scores were 63.75% (*In Re Ziegler,* Del.Supr., No. 438, 1993, Moore, J. (Jan. 3, 1994) (ORDER)); 60.58% (*In Re Locke,* Del.Supr., No. 460, 1993, Moore, J. (Dec. 30, 1993) (ORDER)); 60.83% (*In Re Conaty,* Del.Supr., No. 455, 1993, Moore, J. (Jan. 4, 1994) (ORDER)); and 63 .64% (*In Re Dougherty,* Del.Supr., No 505, 1988, Moore, J. (Dec. 30, 1988) (ORDER)) among others.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 52(f), the within petition be, and the same hereby is, REFUSED.

718 A.2d 526 (Table), 1998 WL 664959 (Del.Supr.), Unpublished Disposition

END OF DOCUMENT

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In the Matter of the Petition of Julie M. DONOGHUE, Petitioner.

No. 526, 1997.

Submitted July 6, 1998.
Decided July 17, 1998.

Before VEASEY, Chief Justice, HARTNETT and BERGER, Justices.

ORDER

**1 This 17th day of July 1998, it appears to the Court that:

(1) Petitioner, Julie M. Donoghue, a member of the Florida and Pennsylvania Bars, appeals from the decision of the **Board** of **Bar Examiners** denying petitioner's petition for review filed pursuant to **Board** of **Bar Examiners** Rule 20. Petitioner passed the Multistate Bar Examination with a score of 151. Petitioner failed, however, to achieve a passing score of 65 on 7 of 12 essays and failed to achieve an average grade of 65 on all essay questions as required by Board Rule 13. Petitioner received an average grade of 64.9 for all essay questions and received a passing score on only 6 of the 12 essay questions. Petitioner failed the Bar Examination. The petitioner seeks relief from this Court from the Board's ruling.

(2) By Order dated June 9, 1998, the Court remanded this appeal to the **Board** of **Bar Examiners** to respond on an expedited basis to a series of procedural questions. By letter memorandum dated June 18, 1998, the Board filed a response to the Court's questions.

(3) By letter dated June 25, 1998, the Clerk of this Court directed the petitioner to file a reply to the Board's response. The petitioner's reply was filed on July 6, 1998.

(4) This Court will not set aside the determination of the Board as to an applicant's professional competence unless the applicant shows fraud, coercion, arbitrariness or manifest unfairness. *In Re Reardon,* Del Supr., 378 A.2d 614, 618 (1977). Having considered the Board's response and the petitioner's reply, we conclude that the petitioner has not demonstrated the arbitrariness or unfairness necessary for this Court to interfere with the Board's decision. [FN*]

FN* While the Court is sensitive to the disappointment of applicants whose scores fall short of the required passing score, we recognize that in any test there must be a passing line. *In Re Fischer,* Del.Supr., 425 A.2d 601, 602 (1981). Accordingly, this Court has affirmed decisions regarding applicants whose essay scores were 63.75% (*In Re Ziegler,* Del.Supr., No. 438, 1993, Moore. J. (Jan. 3, 1994) (ORDER)); 60.58% (*In Re Locke,* Del.Supr., No. 460, 1993, Moore, J. (Dec. 30, 1993) (ORDER)); 60.83% (*In Re Conaty,* Del.Supr., No. 455, 1993, Moore, J. (Jan. 4, 1994) (ORDER)); and 63 .64% (*In Re Dougherty,* Del.Supr., No 505, 1988, Moore, J. (Dec. 30, 1988) (ORDER)) among others.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 52(f), the within petition be, and the same hereby is, REFUSED.

718 A.2d 527 (Table), 1998 WL 664961 (Del.Supr.), Unpublished Disposition

END OF DOCUMENT

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

Joseph J. McINTOSH, Petitioner Below, Appellant,
v.
BOARD OF BAR EXAMINERS, Respondent Below, Appellee.

No. 290,1997.

Submitted: Nov. 12, 1997.
Decided: Dec. 4, 1997.

Before HOLLAND, HARTNETT, and BERGER, Justices.

ORDER

MOLLAND, Justice.

1 This fourth day of December, 1997, the Court having considered this matter on the briefs filed by the parties, has determined that: to the extent the issues raised on appeal are factual, the record evidence supports the **Board of **Bar Examiner's** ("Board") factual findings; to the extent the errors alleged on appeal are attributed to an abuse of discretion, the record does not support those assertions; and to the extent that he issues raised on appeal are legal, they are controlled by settled Delaware law, which was properly applied. *Accord Kosseff v. **Board of Bar Examiners***, Del.Supr., 475 A.2d 349 (1984). *In re Green*, Del.Supr., 464 A.2d 881 (1983). Therefore, this Court has concluded that the judgment of the Board should be affirmed on the basis of and for the reasons assigned by the Board in its decision issued June 27, 1997.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Board be, and the same hereby is AFFIRMED, without prejudice to the appellant's reapplying to take the Delaware Bar Examination at a future date.

END OF DOCUMENT

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In re M. Dwayne CALDWELL

No. 281,1997.

Submitted July 14, 1997.
Decided July 18, 1997.

Appeal from the **Board** of **Bar Examiners**

Before VEASEY, Chief Justice, HARTNETY and BERGER, Justices.

ORDER

**1 This 18th day of July 1997, upon consideration of the briefs of the parties, it appears to the Court that:

(1) M. Dwayne Caldwell seeks review of a decision by the **Board** of **Bar Examiners** ("Board") denying his application to retake the Bar Examination. Caldwell did not file his application until after the April 15, 1997 deadline, and the Board ruled that Caldwell failed to demonstrate that circumstances beyond his control made it not reasonably practicable to file the application on time.

(2) In early April, Caldwell telephoned the Board's office and requested an application. He was told that one would be mailed to him "immediately." Caldwell did not receive an application in the mail and, on April 25, 1997, he walked over to the Board's office and picked one up. By that time, the deadline had already passed.

(3) Caldwell filed his application on April 28, 1997, and requested an extension of the filing deadline. He cited his employment and family situation as the primary circumstances outside of his control that caused him to miss the deadline. In brief, his workload as a Superior Court clerk had increased substantially during the spring of 1997. At the same time, because of his wife's busy schedule, Caldwell was primarily responsible for the care of their one-year-old son and their household.

(4) The Board rejected Caldwell's petition for an extension by letter dated June 13, 1997. The Board found that Caldwell did not meet his burden under **Board** of **Bar Examiners** Rule 5(d) of establishing that "because of one or more circumstances outside of the applicant's control it was not reasonably practicable for the applicant to file within the specified time limit...."

(5) We review the Board's decision for abuse of discretion. *Petition of Curtis S. Alva,* Del.Supr., No. 269, 1988 (July 15, 1988) (ORDER). Caldwell contends that there were three reasons, all outside of his control, that caused him to miss the deadline: (i) significantly increased workload; (ii) significant family responsibilities; and (iii) his failure to receive an application form from the Board after requesting one by telephone. The Board found that none of these circumstances made it "not reasonably practicable" to meet the filing deadline. We find no abuse of discretion. We recognize the significant demands on Caldwell's time and attention, but the Board was justified in concluding that those demands did not warrant an extension of the filing deadline.

NOW, THEREFORE, IT IS DETERMINED, pursuant to Supreme Court Rule 52(f), that petitioner's request for relief from the refusal of the Board to grant a waiver of the filing deadline is DENIED.

698 A.2d 409 (Table), 1997 WL 425496 (Del.Supr.), Unpublished Disposition

END OF DOCUMENT

Supreme Court of Delaware.

In re Petition of Thomas E. CAHILL
(Applicant No. 118).

No. 8, 1996.

Submitted: May 29, 1996.
Decided: June 10, 1996.

Applicant's petition for special accommodations in taking bar examination was denied without hearing by the **Board** of **Bar Examiners** of the Delaware Supreme Court. Applicant appealed. The Supreme Court, Holland, J., held that hearing was required to resolve factual dispute concerning existence of any disability that would entitle petitioner to special accommodations.

Reversed and remanded.

West Headnotes

[1] Attorney and Client ⚿ 6
45k6 Most Cited Cases

Bar applicant was entitled to hearing on issue of whether disability existed which would entitle applicant to special accommodations while taking bar examination; procedures establishing right to petition for hearing to resolve other factual disputes should be applied. **Board** of **Bar Examiners** Rules 15, 30.

[2] Attorney and Client ⚿ 6
45k6 Most Cited Cases

Hearing must be held to resolve factual disputes which result in either denial of application to take bar examination at all or to take bar examination with special accommodation. **Board** of **Bar Examiners** Rules 15, 30.

*40 Upon Petition from the **Board** of **Bar Examiners**. REVERSED.

John R. Weaver, Jr., Wilmington, for petitioner.

Kent A. Jordan, Wilmington, for **Board** of **Bar Examiners**.

Before VEASEY, C.J., HOLLAND and BERGER, JJ.

HOLLAND, Justice:

This is an appeal from a decision of the **Board** of **Bar Examiners** of the Delaware Supreme Court (the "Board") denying the appellant's, Thomas E. Cahill's ("Cahill") Petition for Special Accommodations in taking the 1995 Delaware Bar Examination. Cahill contends that it was arbitrary, unfair, and a denial of due process for the Board to deny him special accommodations without a hearing. This Court has concluded that Cahill's contention is meritorious.

Facts

Cahill failed to pass the Delaware Bar Examination in 1991, 1992, and 1993. Following this Court's decision in *Rubenstein,* Cahill decided to ascertain whether his lack of success with the Bar Examination might also be attributable to a learning disability. *See In re Rubenstein,* Del.Supr., 637 A.2d *41 1131 (1994). Cahill arranged to be tested by the expert identified in *Rubenstein,* William F. Shaw, M.Ed., NCSP, a Delaware licensed psychologist.

Cahill initially contacted Mr. Shaw in 1994. Rule 28 of the **Board** of **Bar Examiners** Rules ("Board Rules" or "B.R.") then provided that a qualified applicant could take the Bar Examination three times. In 1994, Board Rule 28 also gave the Board discretion, upon an appropriate showing of special circumstances, to grant an applicant a fourth opportunity to take the Bar Examination.

Cahill's 1994 Petition

Cahill's first submission to the Board of a report from Mr. Shaw was made in conjunction with a petition to take the Bar Examination a discretionary fourth time. Mr.

Shaw's report expressed the conclusion that Cahill had a learning disorder which warranted affording him a fourth opportunity to take the Bar Examination and with special accommodations. Mr. Shaw attributed Cahill's disability to a high fever in 1984.

In response to Cahill's petition, the Board, *sua sponte,* sought the assistance of Dr. Frank R. Vellutino, Ph.D., a licensed psychologist in the State of New York. Dr. Vellutino reviewed Mr. Shaw's report. In a June 21, 1994, letter, Dr. Vellutino reported to the Board, *inter alia* :

> All things considered, I cannot concur with Mr. Shaw's analysis and interpretation of Mr. Cahill's test results and am quite confident in concluding that there is no compelling evidence in these results or in Mr. Shaw's report that Mr. Cahill suffers from any basic cognitive or linguistic deficit or any basic deficit in skills and abilities necessary for taking the bar exam under normal circumstances.

By letter dated June 28, 1994, the Board informed Cahill that his petition to take the Bar Examination a fourth time was denied. Cahill was provided with a copy of Dr. Vellutino's report. Cahill was informed of his right to request a hearing on the Board's denial of his petition to take the Bar Examination for a fourth time. Cahill initially requested a hearing on the Board's decision denying his request to take the 1994 Bar Examination, but subsequently withdrew his petition.

Cahill's 1995 Petition

In 1995, Cahill again petitioned to take the Bar Examination a discretionary fourth time. On April 19, 1995, however, Board Rule 28 was amended to provide four opportunities to take the Bar Examination, with a fifth opportunity in the Board's discretion. *See In re Murray,* Del.Supr., 656 A.2d 1101, 1102 n. 3 (1995). The Board informed Cahill of the change in Board Rule 28. The Board also advised him that he would have to immediately file a petition pursuant to Board Rule 15, if he wanted any special accommodations in taking the 1995 Bar Examination.

On May 2, 1995, Cahill filed a petition for special accommodations. *See* B.R. 15. Cahill submitted two additional reports in support of his petition: a supplemental report by Mr. Shaw and a report by Dr. Pedro M. Ferreira, Ph.D., another licensed psychologist. Dr. Ferreira's report was based upon a review of the analyses and conclusions set forth in Mr. Shaw's and Dr. Vellutino's reports.

The Board again asked Dr. Vellutino to evaluate the opinions of Cahill's experts. In a June 7, 1995, letter report to the Board, Dr. Vellutino concluded that his "analysis of the new materials provided by Mr. Shaw gives me no reason to alter my previous conclusion that results from Mr. Shaw's assessment provide no compelling evidence that Mr. Cahill suffers from organic brain injury that slows down his rate of reading and impairs reading comprehension." He explained the bases for that conclusion. Dr. Vellutino stated that his analysis also applied to Dr. Ferreira's report.

On June 12, 1995, without a hearing, the Board informed Cahill that his 1995 petition for special accommodations had been considered and was denied. The Board's decision was based upon its acceptance of Dr. Vellutino's 1994 and 1995 reports. Cahill was provided with a copy of Dr. Vellutino's June 7, 1995 report.

**42 Board's 1995 Decisions*

The Board advised Cahill of its view that he had no right to a hearing but did have 30 days to appeal the Board's decision to this Court, if he believed the Board's decision affected his substantial rights. B.R. 41. Cahill did not file an appeal at that time. Cahill took the 1995 Bar Examination without special accommodations and, once again, failed to pass.

On November 8, 1995, Cahill filed a petition with the Board pursuant to Board Rule 20. [FN1] The Board informed Cahill that his "petition was denied by the Board because it does not raise any facts or information which

would cause the Board to reconsider its denial of Cahill's 1995 petition for special accommodations." [FN2] Cahill filed this appeal on January 4, 1996.

FN1. Board Rule 20 provides:
An applicant who is unsuccessful on the Bar Examination, the Professional Conduct Examination, or the Professional Conduct Reexamination may file a petition for review with the Board if the applicant claims to be aggrieved by an action of the Board.
B.R. 20. A petition for review under Board Rule 20 must be filed either 30 days after the results of the Bar Examination have been posted, or 15 days after the date when materials related to the applicant's failure to pass are forwarded to the applicant, whichever is later. *See* B.R. 19, 21.

FN2. Cahill also filed an amended petition under Board Rule 20 on November 29, 1995. However, the Board did not consider Cahill's amended petition, because it viewed the amended petition as untimely filed under Board Rule 21.

The Parties' Contentions

In this appeal, Cahill claims that, in addition to being arbitrary and unfair, the Board's decision denying his request for special accommodations was a denial of his right to procedural due process under the United States and Delaware Constitutions. *See* U.S. CONST. amend. XIV; Del. Const. art. I, § 7. Cahill asserts that he was denied due process of law because the Board did not grant him a hearing on the issue of whether or not he suffered from a learning disability, and did not permit him to present witnesses or to cross-examine the Board's expert.

The Board asserts that Cahill has no constitutional right to a hearing in connection with its denial of his request for special accommodations under Board Rule 15. Accordingly, the Board argues that it has the discretion to either permit submissions beyond the Rule 15 petition itself or to conduct a hearing in connection with a request for special accommodations.

Bar Examinations
Procedural Due Process

The Supreme Court of the United States has held that "[a] State cannot exclude a person from the practice of law ... in a manner or for reasons that contravene the Due Process ... Clause of the Fourteenth Amendment." *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224 (1963) (citing *Schware v. **Board of Bar Examiners** of New Mexico,* 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957)). *Accord In re Reardon,* Del.Supr., 378 A.2d 614, 618 (1977) [FN3] (citing *Schware*). In *Willner,* the Supreme Court held that the applicant "was denied procedural due process when he was denied admission to the bar ... without a hearing on the charges filed against him...." *Willner v. Committee on Character and Fitness,* 373 U.S. at 106, 83 S.Ct. at 1181. The Supreme Court also held that " '[t]he requirements of fairness are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure *as well as to the beginning and intermediate steps.' " Id.*

FN3. In *Reardon,* this Court found that the Board's action with regard to a particular bar examination question was reasonable and rationally furthered a legitimate Board purpose. Thus, the Board's action did not contravene due process or equal protection. *In re Reardon,* Del.Supr., 378 A.2d 614, 618 (1977) .

Procedural Due Process
***Board of Bar Examiners** Rules*

The rules of the Delaware **Board** of **Bar Examiners** provide applicants with the basic rights of procedural due process, if a factual dispute arises in certain enumerated categories. Specifically, an applicant may request a hearing before the Board if a factual dispute ***43** arises with regard to his or her (i) character, aptitude or fitness to practice law, (ii) educational background, (iii) candor during the application and admission process, or (iv) request for a discretionary fifth opportunity to take the Bar Examination. *See* B.R. 29. [FN4]

FN4. Board Rule 29 provides: If an application has not been approved by the Board because there exists disputed issues of fact with regard to the subject

> matter of Supreme Court Rule 52(a)(1) or (4), **Board of Bar Examiners** Rule 7 or 28(b), and/or questions as to the applicant's character or fitness the applicant may petition the Board for a hearing.
> B.R. 29.

If a factual dispute arises in one of the categories enumerated in Board Rule 29, the procedural due process rights of an applicant are set forth in Board Rules 30 through 41. Under these rules, upon timely filing of a petition, an applicant is entitled to a hearing, upon written notice, before a panel of the Board. *See* B.R. 30, 32, 35, 36. Prior to the hearing, the applicant has the right to have witnesses and other sources of evidence subpoenaed. *See* B.R. 36(d), 37. At the hearing, the applicant has the opportunity to appear personally, to be represented by counsel, and to present documentary evidence and witness testimony. *See* B.R. 36(d).

Board Rule 15
Special Accommodation Request

Cahill's petition for special accommodations in taking the 1995 Bar Examination was filed under Board Rule 15, which provides, in relevant part:

> (a) Requests for Special Accommodations. The Bar Examination and Professional Conduct Examination shall be administered in a manner that does not discriminate against individuals with disabilities. An applicant who is otherwise eligible to take the Bar Examination and/or the Professional Conduct Examination may request reasonable special accommodations with respect to the manner in which the examination is administered, if, by virtue of a temporary or permanent disability, the applicant is unable to take the examination under normal testing conditions.
> B.R. 15(a).

Cahill fully complied with all requirements of Board Rule 15 in his 1995 request for special accommodations. Cahill's petition was under oath and designated the nature of the disability that necessitated special accommodations, as well as the specific accommodations requested. *See* B.R. 15(b). [FN5] Cahill's petition was also accompanied by a sworn statement from an appropriate medical expert. *Id.*

> FN5. Board Rule 15(b) provides:
> (b) Form and Timing of Requests. A request for special accommodations must be made by submitting a petition for accommodations with a timely application to take the Bar Examination and/or the Professional Conduct Examination. The petition must be under oath and must designate the nature of the disability that necessitates special accommodations, as well as the specific accommodations requested. The petition also must be accompanied by a sworn statement from appropriate medical experts describing:
> 1. The nature and the extent of the impairment;
> 2. The test or tests performed to diagnose the impairment;
> 3. The effect of the disability on the applicant's ability to take the test under normal testing conditions; and
> 4. The special conditions recommended by the medical expert.
> B.R. 15(b).

Factual Dispute
Special Accommodations Request

Board Rule 15 specifically states that the Board may request additional information from the applicant or, where deemed necessary by the Board, the applicant may be required to undergo a physical examination by an expert chosen by the Board:

> The Board may further require that an applicant seeking special accommodations provide additional information or documentation in support of the application. Such information or documentation may include, but is not limited to, information concerning special accommodations provided during the applicant's legal education and certification from the schools where such special accommodations were provided. Where deemed necessary by the Board, the applicant also may be required *44 to undergo a physical examination to be conducted by a medical expert chosen by the Board. The costs of any examination or testing required by the Board in connection with such a petition shall be borne by the

applicant.
The Board shall review each petition and may, in its discretion grant the request for special accommodations, provide alternative accommodations, or deny the request.
B.R. 15(b).

Neither of the additional options under Board Rule 15 were requested by the Board prior to its denial of Cahill's petition. Rather, the Board, *sua sponte,* contacted Dr. Vellutino, requesting that he review the analyses and conclusions of Cahill's experts, Mr. Shaw and Dr. Ferreira. Dr. Vellutino's opinion regarding the existence of Cahill's disability conflicted with Mr. Shaw's and Dr. Ferreira's reports. The Board resolved that conflict adversely to Cahill based upon its acceptance of Dr. Vellutino's opinion.

Consulting Dr. Vellutino was a reasonable response on the part of the Board to Cahill's petition for special accommodations. The Board's own rules, however, do not provide for such a course of action. [FN6] The Board's consultation with its own medical expert to review the reports submitted by Cahill resulted in a factual dispute regarding the predicate for Cahill's petition, i.e., the existence of any disability.

FN6. The rules of the **Board** of **Bar Examiners** in Ohio provide: "The Board may seek the assistance of a medical, psychological, or other authority of the Board's choosing in reviewing a request." *See* Ohio **Board** of **Bar Examiners** Policy on Applicants with Disabilities, § IV(A)(1). The Board's Rule 15 has been amended today to include an identical provision.

Board Procedures Modified

[1] This opinion has noted that the Board's Rules specifically provide an applicant with the right to petition for a hearing to resolve certain factual disputes. B.R. 30. There are no procedures, however, in the event of a factual dispute regarding an applicant's request for special accommodations under Board Rule 15. Having created a hearing process to resolve certain factual disputes, the Board should have provided Cahill with the same procedural rights regarding his disputed request for special accommodations. *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). *See also In re Rubenstein,* Del.Supr., 637 A.2d 1131 (1994).

[2] Admission to the Delaware bar is governed exclusively by this Court. *In re Hudson,* Del.Supr., 402 A.2d 369 (1979). The application and testing procedures are administered by the Board, which is appointed by this Court. Supr.Ct.R. 51 and 52. This Court holds that factual disputes which could result in either the denial of an application to take the Bar Examination at all or to take the Bar Examination with special accommodations must be resolved by the Board in the same manner.

In that regard, this Court notes that a committee or panel of the Board makes the initial factual determination about an application, e.g., character and fitness. B.R. 4(d). If a preliminary factual dispute arises involving character or fitness, which would be disqualifying if resolved adversely, the applicant can petition for a hearing. B.R. 29. Such a dispositive hearing is conducted by a separate panel of the Board and constitutes the Board's final action. B.R. 32. [FN7] The same procedural steps must be followed by the Board when investigating and deciding petitions for special accommodations. [FN8] *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224 (1963). *In re Reardon,* Del.Supr., 378 A.2d 614 (1977). *In re Rubenstein,* Del.Supr., 637 A.2d 1131 (1994).

FN7. If the request for special accommodations is completely or partially denied, the applicant can appeal to this Court before or after taking the Bar Examination. Supr.Ct.R. 52(f); B.R. 41.

FN8. *See* Pobjecky, *The Demands of Due Process in Bar Admission Proceedings, The Bar Examiner,* Feb. 1996, at 45.

Cahill's Remedy

The record reflects that Cahill took the

Delaware Bar Examination for a fourth time in 1995. Consequently, Cahill will only be ***45** permitted to take the Delaware Bar Examination again, in the discretion of the Board. B.R. 28(b). This Court has, however, exclusive authority with respect to applications for admission to the Delaware Bar. *In re Rubenstein,* 637 A.2d at 1140.

The Board should not have denied Cahill's 1995 Rule 15 request for special accommodations without a hearing. *Willner v. Committee on Character and Fitness,* 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224 (1963); *In re Rubenstein,* 637 A.2d at 1139. *Compare In re Applicant No. 5,* Del.Supr., 658 A.2d 609, 612-13 (1995). The appropriate and equitable remedy is for this Court to order that the next time Cahill sits for the Delaware Bar Examination shall be *deemed* to be his fourth opportunity for purposes of Board Rule 28. [FN9] Cahill, and any other applicant for the Delaware Bar Examination who petitions for special accommodations, will be afforded the procedural rights set forth in this opinion. [FN10]

FN9. Cahill submits that the only appropriate equitable remedy in this case would be for this Court to exercise its plenary authority to grant his request for admission to the Bar, as this Court did in *Rubenstein.* However, the remedy in *Rubenstein* was considered by this Court to be only appropriate to the "limited and unique circumstances" of that case. *In re Murray,* Del.Supr., 656 A.2d 1101, 1103 (1995).

FN10. Board Rule 29 has been amended today. As amended, Board Rule 29 now provides:
RULE 29. Petition for a Hearing.
If an application has not been approved by the Board because there exists disputed issues of fact with regard to the subject matter of Supreme Court Rule 52(a)(1) or (4), **Board** of **Bar Examiners** Rule 7, Rule 15, or Rule 28(b), and/or questions as to the applicant's character or fitness the applicant may petition the Board for a hearing.

Conclusion

The Board's decision to deny Cahill special accommodations without a hearing is reversed. This matter is remanded for further proceedings in accordance with this opinion. The mandate shall issue forthwith.

677 A.2d 40, 8 NDLR P 179

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Supreme Court of Delaware.

In the Matter of the Petition of APPLICANT NO. 5 TO the 1994 DELAWARE BAR AND PROFESSIONAL CONDUCT EXAMINATIONS.

No. 489, 1994.

Submitted: May 3, 1995.
Decided: May 15, 1995.

Bar examinee petitioned for reconsideration of his failing exam grades. The **Board** of **Bar Examiners** denied petition. Examinee appealed. The Supreme Court, Walsh, J., held that: (1) it would not deem examinee's claim of lack of special accommodations to have been waived; (2) Board did not act unfairly in its accommodations of dyslexic examinee; and (3) record failed to support granting of waiver of objective standards for examinee's admission to bar.

Affirmed.

West Headnotes

[1] Attorney and Client ⇐ 7
45k7 Most Cited Cases

Board of **Bar Examiners**' primary function is administering tests for measuring professional competence in order to determine which applicants possess minimal competence for practice of law.

[2] Attorney and Client ⇐ 7
45k7 Most Cited Cases

Unless it is demonstrated that **Board** of **Bar Examiners** has discharged its responsibility in an arbitrary, fraudulent, or unfair manner, Supreme Court will not interfere with Board's determination.

[3] Attorney and Client ⇐ 7
45k7 Most Cited Cases

Where bar examination procedures, as distinguished from grading, are called into question, Supreme Court's inquiry is whether **Board** of **Bar Examiners**' procedures are rationally related to testing purpose; if so, Supreme Court will not disturb testing result since the Constitution does not require a perfect test nor does it require perfect examiners.

[4] Attorney and Client ⇐ 7
45k7 Most Cited Cases

Supreme Court would not deem bar examinee's claim of lack of special accommodations to have been waived, although examinee did not dispute special accommodations granted in both years examinee took bar, did not raise any such question in initial petition seeking regrading, and did not raise issue of inadequate accommodation until examinee filed amended petition, where Board reached merits of regrading request despite untimeliness of amended petition, Board's initial rejection of untimely petition for regrading recited failure "to comply with BR22" without specific recital of what portion of Board Rule 22 was implicated, and examinee claimed that he was under medication at time of filing initial petition. Sup.Ct.Rules, Rule 52(f).

[5] Attorney and Client ⇐ 6
45k6 Most Cited Cases

Board of **Bar Examiners** did not act unfairly in its accommodations of dyslexic examinee; both times examinee took exam, Board granted him time and one-half and an isolated location to take exam, as examinee requested, Board initiated special accommodations second time examinee took exam, and examinee never requested additional testing days, nor expressed dissatisfaction with special accommodations until he filed amended petition seeking regrading.

[6] Attorney and Client ⇐ 7
45k7 Most Cited Cases

In the absence of a determination of

unfairness or arbitrariness, Supreme Court will not exercise its plenary authority to grant admission to bar applicant who has not satisfied standards that govern admissions generally.

[7] Attorney and Client ⇐ 7
45k7 Most Cited Cases

Record failed to support granting of waiver of objective standards for examinee's admission to bar, although examinee successfully passed another state's bar exam and received high score on portion of Delaware's exam, where examinee missed other criteria required to pass Delaware's exam.

*609 Upon appeal from the **Board** of **Bar Examiners**. AFFIRMED.

*610 David A. Boswell, Schmittinger & Rodriguez, P.A., Wilmington, for petitioner.

Donald E. Reid, Wilmington, for Bd. of Bar Examiners.

Before WALSH, HARTNETT and BERGER, JJ.

WALSH, Justice:

This is an appeal pursuant to Supreme Court Rule 52(f) from a decision of the **Board** of **Bar Examiners** of the State of Delaware ("Board") which denied a petition for reconsideration of petitioner's failing grades in the 1994 Bar Examination. The petitioner, who has been accorded anonymity under the number assigned him in the examination, contends the Board acted arbitrarily in not affording him additional examination time to accommodate his disability of dyslexia. Alternatively, petitioner argues that he has demonstrated his competence to practice law in Delaware, and this Court should order his admission notwithstanding the Bar examination results. We conclude that the Board did not act unfairly in its accommodation of petitioner's disability, and that the record does not support the granting of a waiver of the objective standards for admission to the Bar.

I

Petitioner first sought admission to the Delaware Bar in 1993 when he applied to sit for the Bar Examination, consisting of the Multistate Bar Examination ("MBE"), the essay sections and the Professional Conduct Examination. As permitted under Rule 15 of the **Board** of **Bar Examiners** Rules, [FN1] the petitioner requested special accommodations because he "has been diagnosed as being dyslexic." Petitioner recited that he had been consistently granted time and one-half to take exams in law school as well as in the SAT and LSAT examinations. Petitioner's specific request was that he be granted "Extra time to take the Bar Exam (namely, time and 1/2) and, a sequestered room to take the examination." Petitioner also sought "confidentiality and anonymity" with respect to the request and "the facts supporting it."

FN1. Rule 15(a) provides:
(a) Requests for Special Accommodations. The Bar Examination and Professional Conduct Examination shall be administered in a manner that does not discriminate against individuals with disabilities. An applicant who is otherwise eligible to take the Bar Examination and/or the Professional Conduct Examination may request reasonable special accommodations with respect to the manner in which the examination is administered, if, by virtue of a temporary or permanent disability, the applicant is unable to take the examination under normal testing conditions.

In support of his request for special accommodations, petitioner supplied an undated letter from a physician, Harold N. Levinson, M.D., a New York psychiatrist who specializes in dyslexia, which stated that petitioner suffered from "Dyslexia secondary to a Cerebellar-Vestibular Dysfunction," and that "[o]ral, untimed tests, as well as tapes for the blind would be very beneficial." Petitioner also supplied a 1982 letter from his high school guidance counselor which recited that petitioner exhibited "a learning disability in the visual memory and visual sequencing areas." Also submitted by petitioner was a letter from his law school's registrar attesting to the fact that petitioner had been allowed time and one-half for all of his law school

examinations.

The Board granted petitioner's request for special accommodations for the 1993 bar examination by affording him time and one-half for each essay session and providing him with a separate room. Petitioner failed both the MBE and the essay portion of the 1993 examination.

Petitioner filed a timely application to take the 1994 examination but did not petition for special accommodations. Despite his failure to so request, the Secretary of the Board wrote to petitioner on June 3, 1994, to call his attention to his failure to request special accommodations for the upcoming examination. Petitioner was requested to notify the Board by July 1, 1994, "[i]f you wish such accommodations." In response, petitioner requested the same special arrangements as were granted in 1993: "Extra time to take the 1994 DE Bar Exam (namely, time and 1/2) and a sequestered room to take the examination." On July 6, 1994, the Board granted the special accommodations as requested, *611 *i.e.*, time and one-half for the Professional Conduct and the essay portions of the examination.

Petitioner passed the MBE portion of the 1994 Bar Examination with a score of 161 (the minimum passing score is 130) but failed the essay portion with an average score of 63.2 (a minimum average score of 65 is required). Petitioner also failed the Professional Conduct examination. Petitioner then filed a "petition for Regrade" with the Board in which he recited that he believed "mistakes were made by the bar examiners in grading questions in the subjects of evidence and criminal law, as well as other subjects." The Board denied the petition for review for failure to comply with Board Rule 22, *i.e.*, petitioner had identified himself by revealing his name rather than his examinee number only. On December 8, 1994, petitioner, through counsel, filed a "Petition for Reconsideration of Petition for Review" which: (a) recited petitioner's history of dyslexia; (b) requested excusal of his error in not complying with the Board Rule 22 because he was under medication at the time of filing; (c) sought consideration of an amended petition for regrading based on fatigue factors and the Board's failure to accommodate his disability; and (d) requested a recalculation of his essay scores by striking low scores or adding five-point increments to compensate for his disability-based fatigue.

The Board rejected the Petitioner's request for reconsideration as untimely under Supreme Court Rule 52(f). The Board did, however, regrade his answers to questions 5 and 6, as requested in his initial petition, and determined that petitioner was not entitled to further credit. Petitioner then appealed to this Court as permitted under Supreme Court Rule 52(f).

II

[1][2][3] In exercising appellate review of actions of the **Board** of **Bar Examiners**, this Court performs a limited role. The primary function of the Board is the administering of tests for measuring professional competence in order to determine which applicants possess the minimal competence for the practice of law. *In re Reardon,* Del.Supr., 378 A.2d 614, 617 (1977). Unless it is demonstrated that the Board has discharged its responsibility in an arbitrary, fraudulent or unfair manner, this Court will not interfere with the Board's determination of competence. *In re Fischer,* Del.Supr., 425 A.2d 601 (1981). Where bar examination procedures, as distinguished from grading, are called into question, this Court's inquiry is whether the Board's procedures are rationally related to the testing purpose. If so, this Court will not disturb the testing result since the "Constitution does not require a perfect test nor does it require perfect examiners." *In re Reardon,* 378 A.2d at 619.

[4] Before addressing the merits of the appeal, we note the Board's contention that petitioner has waived his claim of entitlement to additional accommodations by not disputing the time and one-half arrangement granted both in 1993 and 1994 and, in particular, by not raising any such question in his November 17, 1994 initial petition to the Board seeking a regrading. The Board correctly points out

that it was not until petitioner filed his amended petition, beyond the time permitted by Rule 52(f), that he first complained of inadequate accommodations. While we agree that the Board's position is technically correct, we note the Board's own action in reaching the merits of the regrading request despite the untimeliness of the amended petition. Moreover, the Board's initial rejection of the petitioner's untimely petition for regrading recited a failure "to comply with BR22" without a specific recital of what portion of Board Rule 22 was implicated. Finally, we note petitioner's claim that he was under medication at the time of the filing of his November 17, 1994 petition, a contention not disputed by the Board. Under all the circumstances, and consistent with the Board's own action in considering the merits of the amended petition, we do not deem the petitioner's claim of lack of special accommodations to have been waived.

Petitioner's basic grievance is that the Board did not sufficiently accommodate his disability by granting him double time to take the examination. Specifically, petitioner contends that, while the Board granted him time and one-half for the examination in both *612 1993 and 1994, it should have recognized the fatigue factor that the longer examination periods entail and extended the three days of examination to four days. In support of his claim, petitioner relies upon a July 19, 1994 letter ruling of the Civil Rights Division of the U.S. Department of Justice which advised the Committee of Bar Examiners of the State of California that bar applicants seeking one and one-half times for testing should also receive additional testing days. The ruling in question suggests that the failure to provide such accommodations may constitute a violation of Title II of the Americans with Disabilities Act of 1990 ("ADA").

[5] The question of whether the Board's procedures or practices are unfair to a disabled applicant must be resolved on the basis of the Board's action on the record before us. While a ruling of the Department of Justice may be pertinent, and even dispositive, when it is directed to a specific complaint before it, it does not control the appropriateness of the Board's action here. Petitioner twice sought special testing accommodations from the Board in the form of time and one-half and an isolated location. Both requests were granted as requested for the 1993 examination, as well as the 1994 examination. Indeed, the Board itself initiated the special arrangement for the 1994 examination. Petitioner never requested additional testing days, nor expressed any dissatisfaction with his special accommodations until his amended petition in December, 1994. [FN2]

FN2. Petitioner claims that his request for time and one-half was based on his being informed that untimed or double-time testing would not be granted by the Board. Board personnel who spoke to petitioner have submitted affidavits in which they deny advising petitioner that the untimed or double-time testing was not an option, or that the Board had any policy against such an accommodation. In fact, the Board did grant one applicant more than time and one-half, as well as additional testing days at the 1994 examination.

Our review of the record, as supplemented by the affidavits and submissions of the parties, leads us to the conclusion that the Board accommodated petitioner to the full extent of his request. These accommodations were consistent with his known disability and the pattern of testing he experienced in law school. While it may be, as petitioner's medical submissions indicate, that he might have benefited from additional test days to lessen his fatigue, such information was made available to the Board post hoc. Not only is there no basis in this record to conclude that the Board acted unfairly in response to petitioner's disability, there is clear evidence that the Board granted to another applicant in the 1994 examination the specific accommodations that petitioner now seeks. To the extent petitioner failed to request that which the Board was willing to grant, his plight is one of his own making.

III

Petitioner argues that, notwithstanding the Board's efforts to accommodate his disability,

the Court should exercise its plenary power to grant him admission because he has demonstrated his competence under the standard set forth in *In re Rubenstein,* Del.Supr., 637 A.2d 1131 (1994). In *Rubenstein,* this Court ruled that the Board's decision to grant a disabled applicant additional time for one portion of the bar examination while denying additional time for the remainder was manifestly unfair. Here, the Board granted petitioner the full extent of the special accommodations, as to time and place, that he requested. *Rubenstein* is clearly distinguished factually from the circumstances of this case and is not viewed as general authority for waiver of admission standards. *In re Murray,* Del.Supr., 656 A.2d 1101, 1103 (1995).

[6][7] In the absence of a determination of unfairness or arbitrariness, this Court will not exercise its plenary authority to grant admission to a Bar applicant who has not satisfied the standards that govern admissions generally. This Court has observed that "neither the Board nor the Court can undertake, as a general function, the granting of bar admissions on waiver of minimum competence standards." *In re Fischer,* 425 A.2d at 603. We recognize petitioner's attainments in successfully passing the Pennsylvania bar examination and the high score achieved by him in the 1994 MBE portion of the examination, but this Court's decisional ***613** standards do not permit the granting of relief "to applicants with distinguished credentials who have missed any of the Board's criteria by even the slightest of margins" in the absence of unique or unusual circumstances. *In re Murray,* 656 A.2d at 1104 n. 10.

Finally, we note petitioner's allegation that the Board disregarded the results achieved by certain applicants to Essay Question No. 11 because that question was deemed defective. Apparently, petitioner's assertion is not based on first hand knowledge, and he sought discovery from the Board to pursue his claim. We denied such discovery as not authorized in the absence of a *prima facie* showing of impropriety. *See In re Petty,* Del.Supr., 410 A.2d 1021, 1024 (1980). In any event, the Board has responded to this allegation by an affidavit which recites that: (i) the average score of all applicants on Question No. 11 on the 1994 Bar Examination was higher than the average score on three other questions on that exam and (ii) the Board did not disregard any applicant's score on Question No. 11. Since it clearly appears that petitioner's claim that the Board acted arbitrarily in its grading of Question No. 11 is without foundation, there is no basis for review of the Board's grading procedures. *Cf. In re Reardon,* 378 A.2d at 617.

In sum, we conclude that the petitioner has failed to demonstrate unfairness or arbitrariness on the part of the Board with respect to either the accommodations afforded him in connection with his disability or in the grading of his examination. Accordingly, we AFFIRM the decision of the Board.

We assume that if petitioner wishes to sit for the 1995 Bar Examination, he will promptly apply for such accommodations as his disability requires. To that end, the Board is directed to waive any applicable time requirements which would otherwise preclude petitioner from sitting for the 1995 examination.

658 A.2d 609, 6 NDLR P 357

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Supreme Court of Delaware.

In re Petition of John M. MURRAY.

No. 482, 1994.

Submitted: April 5, 1995.
Decided: April 21, 1995.

Bar applicant petitioned for review from decision by **Board** of **Bar Examiners** refusing to waive requirement that applicant achieve passing score in both sections of bar examination in same sitting and refusal to issue certificate of admission. The Supreme Court, Veasey, C.J., held that: (1) Board did not act arbitrarily or unfairly in refusing to waive requirements of Bar Examiners Rule 52.4(c), and (2) applicant was not entitled to remedy in absence of arbitrary or unfair refusal to waive requirements of disputed rule.

Affirmed.

West Headnotes

Attorney and Client ⇐ 4
45k4 Most Cited Cases

Bar applicant was not entitled to waiver of requirement that passing scores must be achieved on both sections of bar examination for bar admission despite applicant's overall competency and nonbar exam accomplishments; applicant was not entitled to remedy in absence of showing that refusing waiver request was unfair or arbitrary. **Board** of **Bar Examiners** Rule BR-52.4(c) (Repealed).
***1101** Upon appeal from the **Board** of **Bar Examiners**. AFFIRMED.

Eugene H. Bayard (argued), Wilson, Halbrook & Bayard and Stephen P. Ellis, Sergovic & Ellis, Georgetown, for petitioner.

Donald E. Reid, Morris, Nichols, Arsht & Tunnell, Wilmington, for Bd. of Bar Examiners.

Before VEASEY, C.J., HOLLAND and HARTNETT, JJ.

VEASEY, Chief Justice:

This matter is before the Court pursuant to Supreme Court Rule 52(f). Petitioner John M. Murray ("Murray") contends that the **Board** of **Bar Examiners** (the "Board") acted arbitrarily and unfairly in refusing to waive the requirements of the **Board** of **Bar Examiners** Rule 52.4(c) ("B.R. 52.4(c)") [FN1] and to issue a certificate of admission into the Bar of the State of Delaware. For the reasons set forth below, we hold that the Board acted properly in denying Murray's petition for a waiver from B.R. 52.4(c) and thus affirm the Board's decision. Furthermore, we decline to exercise our plenary authority to waive the one-sitting requirement of that rule.

FN1. That rule (now codified as **Board** of **Bar Examiners** Rule 13(a)) provided in relevant part: "An applicant shall be deemed to have passed the Bar Examination if he achieves a scaled score of not less than 130 on the MBE and an average of not less than 65.0 on all twelve essay questions on the Bar Examination...." B.R. 52.4(c). "[R]ule 52.4(c) ... requires an applicant to achieve specified minimum scores on *both* sections of the Delaware Bar Examination in the *same* administration of that test...." *In re Rubenstein,* Del.Supr., 637 A.2d 1131, 1134 (1994).

I. FACTS

The strength of Murray's academic and career background is beyond question. [FN2] Murray did not, however, enjoy success with the Delaware Bar Examination (the "bar exam"). His bar exam record in Delaware is as follows: In 1992 and 1993, he passed the Multistate Bar Examination (the "MBE") portions but failed the essay sections and the Professional Conduct Examination in both years; in 1994, he passed the bar exam's essay section and the Professional Conduct ***1102** Examination but failed the MBE portion of the bar exam by one point. Thus, he has failed three times to pass the bar exam, which had been the effective limit applicable to him under the version of **Board** of **Bar**

Examiners Rule 28(a) ("B.R. 28(a)") in effect when Murray filed his petition currently before the Court. [FN3]

FN2. Murray received a B.A. from Providence College, an M.Acc. and a J.D. from Southern Illinois' College of Business and Law School respectively, and an LL.M. from Boston University Law School. Murray passed the Massachusetts, Pennsylvania, and New Jersey bar exams, and the Certified Public Accountants exam. Upon graduation from law school, Murray worked first at Ernst & Young as a tax consultant, then as an Attorney-Advisor (a federal clerkship) in the United States Tax Court, and finally as an associate at Young, Conaway, Stargatt and Taylor. He also taught a law course at Wilmington College and accounting classes at Delaware Technical Community College.

FN3. In an Order issued April 19, 1995, the Court has amended B.R. 28. The new rule states:
Rule 28. LIMITATION ON REEXAMINATION OPPORTUNITIES.
(a) Four Opportunities. Except as provided in subsection (b) below, no applicant shall be permitted more than 4 opportunities to pass the Bar and Professional Conduct Examinations. A failure of either such examination or a Professional Conduct Reexamination shall constitute 1 such opportunity. For example, if the applicant passed the Bar Examination but failed the Professional Conduct Examination, the applicant would have only 3 more opportunities to pass the Professional Conduct Examination.
(b) Discretionary Fifth Opportunity. An applicant who has failed to pass the Professional Conduct Examination and the Bar Examination after 4 opportunities may be afforded a fifth opportunity, in the discretion of the Board, subject to such conditions with respect to additional study as the Board shall deem appropriate. An applicant seeking leave to be afforded a fifth opportunity shall have the burden of providing the Board with evidence by means of a petition under oath:
(1) That there existed physical, emotional or other good reason constituting mitigating circumstances for the applicant's failure to pass 1 or more of the prior examinations; and
(2) That such reason, or reasons, have been resolved and the applicant knows of no impediment to the applicant's preparation for the fifth examination.
Thus, Murray is now eligible, as a matter of right, to take the entire bar exam without any further showing or leave of the Board or this Court.

After receiving notice of the July 1994 bar exam results, Murray sought certain information--a list of past petitions filed, granted, and denied under **Board** of **Bar Examiners** Rule 21 and Supreme Court Rule 52(f)--from the Board in order to prepare his petition. The Board replied that Murray should set forth specific grounds for his request. Upon receiving a response from Murray that the Board deemed inadequate, it denied Murray's request. The Board noted that, even if it were inclined to grant the request, it could not do so for it lacked a compilation of such data.

On November 17, 1994, the Board informed Murray by letter that his petition for admission was denied because a manual scoring of the July 1994 MBE, undertaken per Murray's request, still yielded a score of 129, one point below the minimum pass score of 130. Murray now seeks admission to the Bar of the State based either on a reversal of the Board's decision or on an exercise of this Court's plenary power to suspend B.R. 52.4(c). [FN4] Alternatively, he seeks an opportunity to retake only the MBE portion and, if successful, to be admitted to the Bar.

FN4. Only because the Board's action may have prevented Murray from ever gaining admission to Delaware's Bar under the old B.R. 28 did we consider the merits of his petition. *See Rubenstein,* 637 A.2d at 1134 (stating that such a situation affects an applicant's "substantial rights," a prerequisite for review under Supreme Court Rule 52(f)).

II. THE BOARD'S REJECTION OF MURRAY'S PETITION

The gist of Murray's contention is that the Board acted arbitrarily and unfairly in refusing to waive B.R. 52.4(c). He argues that the Board's perfunctory application of that rule overlooked his overall competence, evidenced by his non-bar exam accomplishments. Murray relies principally on *In re Rubenstein,* Del.Supr., 637 A.2d 1131

(1994), in support of his argument.

The Board does not challenge Murray's qualifications in any respect except for his failure to pass, at one sitting, the entire July 1994 bar exam, including the MBE portion thereof. As to Murray's argument relating to waiver of B.R. 52.4(c), the Board claims that it has no authority to grant such a request. Further, the Board maintains that, even if it had such authority, Murray has not demonstrated any unique circumstances mandating waiver. We agree with the Board that Murray has not demonstrated any basis for waiving the requirements of B.R. 52.4(c). [FN5]

FN5. Given this conclusion, we need not consider the Board's contention that it lacks authority to waive B.R. 52.4(c).

***1103** "This Court will not set aside [a] determination of the Board as to an applicant's professional competence unless the applicant demonstrates fraud, coercion, arbitrariness, or manifest unfairness." *Rubenstein,* 637 A.2d at 1134; *accord In re Reardon,* Del.Supr., 378 A.2d 614, 618 (1977). [FN6] The Court's review of claims alleging Board arbitrariness or unfairness [FN7] "requires a determination that the factual findings [of the Board] are supported by the record and that the Board's decision is the product of a logical and orderly deductive process." *Rubenstein,* 637 A.2d at 1138; *accord In re Green,* Del.Supr., 464 A.2d 881, 887 (1983).

FN6. *See also* Gene A. Noland, Annotation, *Court Review of Bar Examiners' Decision on Applicant's Examination,* 39 A.L.R.3d 719, 723, 726 (1971 & Supp.1994) (stating that courts generally do not review petitions from unsuccessful bar exam applicants absent a showing of fraud, coercion, unfairness, or arbitrariness); 7 AM.JUR.2D *Attorneys at Law* § 21 (1980 & Supp.1994) (same).

FN7. Murray does not contend that the Board acted fraudulently or coercively.

In *Rubenstein,* petitioner discovered, after her third unsuccessful attempt at passing the Delaware bar exam, that she had a learning disability. 637 A.2d at 1132-33. Based on this finding, which was amply supported by objective evidence in the record of that case, the Board granted her request for additional time to take the essay portion, but denied the request as to the MBE section. *Id.* at 1134.

On appeal, this Court relied solely on the mandate of reasonable accommodation arising from the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (the "Act"), in holding that the Board erred in not also providing Rubenstein additional time to take the MBE portion. *Rubenstein,* 637 A.2d at 1137-38. Only after having determined that the Board acted unfairly did the Court turn to the issue of the appropriate remedy. The Court concluded that granting Rubenstein's request for admission was the most equitable remedy under the limited and unique circumstances of that case. [FN8] This Court stated:

FN8. In providing a remedy for the finding of unfairness, the Court relied on its inherent power to suspend B.R. 52.4(c)'s one-sitting requirement to effect this result. *Id.* at 1139-40.

> Having determined that the Board's decision to deny Rubenstein any additional time to take the MBE portion of the 1993 Bar Examination was manifestly unfair, this Court must consider an appropriate and equitable remedy. Since Rubenstein passed the essay portion of the Bar Examination in 1993, when her learning disability was properly accommodated with additional time to take that test, it would be inequitable to require her to take that section of the Bar Examination again. If Rubenstein was permitted to retake only the MBE portion of the Bar Examination, with additional time, this Court would have to direct a waiver of the requirement that the essay and MBE sections both be passed in one sitting....
> *Id.* at 1139.

The remedy accorded Rubenstein was not a general invitation for unsuccessful applicants to attempt circumventing B.R. 52.4(c). As the Court specifically stated:

> We have concluded that, under the unique

and limited circumstances here, Rubenstein's petition properly invokes this Court's authority to suspend the requirements of Board Rule 52.4(c) that both sections of the Bar Examination be passed during one sitting.

Id. at 1140 (emphasis added). Continuing in footnote 7, the Court explicated the rationale behind the necessity for a disciplined and standardized policy requiring both the essay and MBE portions of the bar exam to be passed at the same sitting:

Nothing in this opinion should be construed as a repudiation of the reasonableness of the general requirement that both the essay and MBE portions of the examination should be passed at the same administration, particularly in order to prevent sequential concentration on one portion of the examination by "locking away" one portion of the examination in one year and concentration on the other portion in a following year.

Id. n. 7 (emphasis added) (citing *In re Hud* *1104 son, *Del.Supr., 402 A.2d 369, 371 (1979)). [FN9]

FN9. *Cf. In re Fischer,* Del.Supr., 425 A.2d 601, 602 (1980) ("generally, in any test, there obviously must be a passing line. We are satisfied ... 'that the requirement of a scaled score of 130 ... represents as accurate as possible a measure of the level of minimum competence necessary for admission to the Delaware Bar[ ]' ") (quoting petitioner's brief).

There is no parallel between Murray's situation and Rubenstein's learning disability. Murray offers no explanation to justify his failure to pass the bar exam in one sitting. Accordingly, Murray's reliance on *Rubenstein* is misplaced. *See also In re Fischer,* Del.Supr., 425 A.2d 601, 602 (1980) (rejecting contention that barring admission into Bar based only on one- point deficiency on MBE portion is patently unfair). [FN10]

FN10. The Court also rejects Murray's reliance on *In re Nenno,* Del.Supr., 472 A.2d 815 (1983), to support his waiver claim. The Court in that case expressly stated that the case should not be cited for waiver petitions. 472 A.2d at 819 n. 6 (noting that reliance on *In re Golby,* Del.Supr., 375 A.2d 1049 (1977), in support of waiver arguments is also misplaced). *Golby* is clearly *sui generis.* Thus, neither *Nenno* nor *Golby* constitute precedent supportive of waiver petitions. Nothing contained in *Rubenstein, Nenno* or *Golby* can be read as authority for the granting of such remedies to applicants with distinguished credentials who have missed any of the Board's criteria by even the slightest of margins absent circumstances equivalent to those presented in those cases.

For the same reason, the Court denies Murray's entreaty that the Court exercise its equitable power to suspend the one-sitting requirement of B.R. 52.4(c). Exercise of that authority in *Rubenstein* was preceded by a finding that the Board acted unfairly in light of the Act. *See* 637 A.2d at 1139-40. Here, as discussed *supra,* Murray has not demonstrated that the Board acted unfairly or arbitrarily. Absent satisfaction of this antecedent, the remedy analysis in *Rubenstein* simply is inapplicable to Murray. In short, here there is no wrong to be remedied. Murray would have the Court engage in unstructured *ad hoc* waivers. This the Court declines to do. Thus, the Court finds that the Board acted properly in denying Murray's petition for a waiver of B.R. 52.4(c) and refuses to effect the same under the Court's inherent authority. The Court also rejects Murray's remaining contentions. [FN11]

FN11. Murray makes several other arguments, all of which lack merit. First, he obliquely argues in his Opening Brief (but denies having made such a contention in his Reply Brief) that his MBE scores should be averaged. The Court has on a prior occasion rejected a similar request. *See In re Hudson,* Del.Supr., 402 A.2d 369, 370-71 (1979). As to Murray's claim that the Board improperly denied his discovery requests, because Murray made no independent showing of Board impropriety, this argument must fail. *See In re Petty,* Del.Supr., 410 A.2d 1021, 1024 (1980) (dictum) ("[w]e regard [petitioner's] request for discovery as moot, but, in any event, he has not made any showing (and, clearly, not a *prima facie* showing) of impropriety by the Board; in the absence of such showing he is not entitled to explore for it among the Board's administrative processes[ ]") (bold emphasis added). Finally, the claim that the MBE itself is unfair is

without legal support and thus is rejected.

III. CONCLUSION

Due to Murray's failure to demonstrate that the Board acted arbitrarily or in a manifestly unfair manner in denying his request that the one-sitting requirement of B.R. 52.4(c) be waived, the Court AFFIRMS the Board's decision. Similarly, the Court DECLINES Murray's request for suspension of the one-sitting requirement.

Murray does not seek an opportunity to sit for the bar exam a fourth time, a remedy that might or might not have been available to him upon demonstration of "good cause" under the old B.R. 28(b). [FN12] *See Fischer,* 425 A.2d at 603-04. He requests in the alternative a chance to retake only the MBE portion of the bar exam. Granting such a request ***1105** would be contrary to Delaware's policy of ensuring that applicants do not employ the "locking away" strategy to pass the bar exam. *See Rubenstein,* 637 A.2d at 1140 n. 7. [FN13] Thus, Murray's alternative request to retake only the MBE portion also is DENIED. Jurisdiction is not retained.

FN12. Nonetheless, an opportunity for a fourth sitting is available to Murray under the new B.R. 28(a). *See supra* note 3.

FN13. The Board persuasively distinguishes two cases in which this Court allowed petitioners to retake only portions of the bar exam because each case involved special circumstances relating to action taken by the Board which had an unfair effect of adversely affecting the petitioners. *See In re Petty,* Del.Supr., 410 A.2d 1021, 1024 (1980) (per curiam) (Board declared that a February reexamination opportunity, granted in previous three years, would not be allowed, but made announcement only after deadline for applications expired); *In re Reardon,* Del.Supr., 378 A.2d 614, 619 (1977) (Board canceled scores for one essay for some applicants but not for petitioners). Here, Murray has not demonstrated the existence of any such special circumstances.

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Supreme Court of Delaware.

In re Petition of Kara B. RUBENSTEIN
(Applicant No. 33).

Submitted: Jan. 25, 1994.
Decided: Feb. 28, 1994.

Applicant for bar examination petitioned for order directing **board** of **bar examiners** to issue certificate that she was qualified for admission to Delaware bar after **board** of **bar examiners** denied such relief. The Supreme Court, Holland, J., held that under unique and unusual circumstances presented, bar applicant, who was learning disabled, was entitled to order directing **board** of **bar examiners** to issue requisite certificate, given her demonstrated competence to practice law and **board** of **bar examiner's** manifestly unfair decision to allow her extra time to complete only portion of bar examination.

Petition granted.

West Headnotes

[1] Attorney and Client ⇐ 7
45k7 Most Cited Cases

Supreme Court could consider bar applicant's petition for relief from decision of **board** of **bar examiners** denying applicant's request to be certified as qualified for admission to bar, notwithstanding bar examination score, where board's denial of applicant's petition affected her "substantial rights"; affect of board's ruling was to prevent applicant who had taken examination on several prior occasions, from ever gaining admission to bar. Sup.Ct.Rules, Rules 52, 52(f), Del.C.Ann.

[2] Attorney and Client ⇐ 7
45k7 Most Cited Cases

Supreme Court will not set aside determination of **board** of **bar examiners** as to applicant's professional competence unless applicant demonstrates fraud, coercion, arbitrariness or manifest unfairness. **Board** of **Bar Examiners** Rule BR-52.4(c), Del.C.Ann.

[3] Attorney and Client ⇐ 4
45k4 Most Cited Cases

No applicant can be certified by **board** of **bar examiners** as qualified for admission to bar of Delaware Supreme Court unless he or she has: first, complied with each of requirements of Supreme Court rule; second, achieved passing score on professional conduct examination; and third, achieved a passing score on bar examination. **Board** of **Bar Examiners** Rule BR-52.1, Del.C.Ann.

[4] Attorney and Client ⇐ 3
45k3 Most Cited Cases

Admission to Delaware bar is governed exclusively by Supreme Court. **Board** of **Bar Examiners** Rule BR-52.1, Del.C.Ann.

[5] Civil Rights ⇐ 1326(1)
78k1326(1) Most Cited Cases
(Formerly 78k198(1))

Board of **bar examiners**, as instrumentality of court, constitutes public entity within meaning of Title II of Americans with Disabilities Act. Sup.Ct.Rules, Rule 51, Del.C.Ann.; Americans with Disabilities Act of 1990, § 201(1), 42 U.S.C.A. § 12131(1).

[6] Civil Rights ⇐ 1033(3)
78k1033(3) Most Cited Cases
(Formerly 78k107(1))

Purpose of Americans with Disabilities Act is to place those with disabilities on equal footing and not give them unfair advantage. Americans with Disabilities Act of 1990, §§ 2-514, 42 U.S.C.A. §§ 12101-12213.

[7] Civil Rights ⇐ 1422
78k1422 Most Cited Cases
(Formerly 78k242(1))

Evidence did not support **board** of **bar examiner's** decision to disregard

recommendation of applicant's expert who recommended, that because of her learning disability, that she be given additional time to complete both sections of bar examination and board's decision to grant applicant additional time with respect to essay portion only; in addition, board's ultimate decision did not reflect that it was product of orderly and logical deductive process. Americans with Disabilities Act of 1990, §§ 2-514, 42 U.S.C.A. §§ 12101-12213; Sup.Ct.Rules, Rules 51, 52, 52(f), Del.C.Ann.

[8] Civil Rights ⇐ 1072
78k1072 Most Cited Cases
(Formerly 78k107(1))

Board of **bar examiner's** decision to not allow learning disabled applicant any additional time to take multistate bar examination portion of 1993 Delaware bar examination was manifestly unfair to applicant. Americans with Disabilities Act of 1990, §§ 2-514, 42 U.S.C.A. §§ 12101-12213; Sup.Ct.Rules, Rules 51, 52, 52(f), Del.C.Ann.

[9] Civil Rights ⇐ 1456
78k1456 Most Cited Cases
(Formerly 78k262.1)

Manifest unfairness to bar applicant, who suffered from learning disability, occurring when **board** of **bar examiners** did not grant her additional time to take multistate portion of bar examination, was to be remedied by directing **board** of **bar examiners** to issue certificate required for admission to Delaware bar, under unique facts and circumstances presented; applicant had demonstrated competence to practice law by passing both essay section and multistate section of bar examination, albeit on separate occasions, and her competence to practice law had been further attested to by members of Delaware judiciary and Delaware bar. **Board** of **Bar Examiners** Rule BR-52.4(c), Del.C.Ann.; Sup.Ct.Rules, Rule 52(e), Del.C.Ann.
***1132** Upon Petition from the **Board** of **Bar Examiners**. GRANTED.

J.R. Julian of J.R. Julian, P.A., Wilmington, for petitioner Kara B. Rubenstein.

Josy W. Ingersoll (argued), and William J. Wade, Wilmington, for **Board** of **Bar Examiners**.

Before VEASEY, C.J., WALSH and HOLLAND, JJ.

HOLLAND, Justice:

Kara B. Rubenstein ("Rubenstein") has petitioned this Court, pursuant to Supreme Court Rule 52(f). Rubenstein contends that, under the facts and circumstances presented, this Court should direct the **Board** of **Bar Examiners** ("Board") to issue a certificate that she is qualified for admission to the Delaware Bar. Supr.Ct.R. 52(e); B.R. 52.1. This Court has concluded that Rubenstein's petition for relief should be granted.

Facts

Rubenstein received a bachelor's degree from the University of Pennsylvania and a *juris doctorate* from the Temple University Law School. Rubenstein first applied for admission to the Delaware Bar in 1990. She made subsequent applications in 1991, 1992, and 1993. In 1990, Rubenstein did not achieve a passing score on the Professional Conduct Examination or either portion of the Delaware Bar Examination, i.e., the essay section or the Multistate Bar Examination ("MBE") section. *See* B.R. 52.4 and 52.5. In 1991, Rubenstein passed the separate Professional Conduct Examination, but once again did not pass the Bar Examination. In 1992, Rubenstein achieved a passing score of 137 on the MBE section, but failed the Bar Examination by not achieving a passing score on the essay section.

From 1989 to 1990, Rubenstein served as a law clerk to the President Judge of the Delaware Superior Court. In the fall of 1990, Rubenstein was certified under Supreme Court Rule 55. That rule provides for limited permission to practice law in Delaware's courts as a part of certain public programs.

In 1990, in accordance with the limited practice provisions of Rule 55, Rubenstein

became employed by the Department of Justice of the State of Delaware as an Assistant Deputy Attorney General. Rubenstein worked as an attorney in that capacity for a period of two years until December 1992. [FN1] As an Assistant Deputy Attorney General, Rubenstein prosecuted driving under the influence and other criminal cases in the Court of Common Pleas in New Castle County. She also appeared in the Superior Court on habitual offender motions in motor vehicle cases and on motions to reinstate motor vehicle licenses.

FN1. The record reflects that the sole reason for the termination of Rubenstein's employment was her failure to pass the Bar Examination.

The record before the Board included evidence of Rubenstein's competence and ability to practice law in the Delaware Superior Court and the Court of Common Pleas during her tenure as an Assistant Deputy Attorney General. That evidence included letters from the Judge she clerked for in the Superior Court, as well as letters from several other judges she had appeared before in the Superior Court and the Court of Common Pleas. An experienced member of the Delaware *1133 Bar, who was frequently Rubenstein's courtroom adversary, wrote to the Board on her behalf, as follows:

> In permitting the admission of an applicant to the Delaware Bar, the Board must always be concerned with whether or not the applicant can competently practice law in this state. That answer cannot always be gleaned from someone's test score. As a result of my unique opportunity to observe Kara Rubenstein practice for over a year in two of the busiest courts of this state under Supreme Court Rule 55, I can unequivocally state she is well qualified to do so.

In support of her petition, the Attorney General of Delaware also wrote to the Board that, as an Assistant Deputy Attorney General, Rubenstein was a "competent and diligent" practitioner and that he found it "inexplicable" that Rubenstein had been unable to pass the Delaware Bar Examination.

After three unsuccessful attempts to pass the Bar Examination, Rubenstein sought an expert's explanation for the anomalous dichotomy between her inability to pass the Bar Examination and her undisputed ability to function effectively as a prosecuting attorney in Delaware courts, pursuant to this Court's limited practice rule. Supr.Ct.R. 55. After careful testing, Rubenstein was advised that she suffered from a learning disability, which had been previously undiagnosed. The exact nature of the disability had no bearing on her intelligence or acumen but related exclusively to the means by which Rubenstein processed information.

Rubenstein's 1993 Board Petition

In April 1993, Rubenstein filed a petition with the Board requesting an exercise of its discretion to permit her a fourth opportunity to take the Bar Examination. B.R. 52.8(e). Rubenstein's petition alleged that she suffered from a learning disability, which had been previously undiagnosed. In support of her petition, Rubenstein presented to the Board a report prepared by William F. Shaw, M.Ed. ("Shaw"), concerning his evaluation of Rubenstein's learning disability. Shaw's report stated, in part:

> The 21 point discrepancy between the verbal and performance abilities suggest that her learning style is that of a linguistic, sequential processor of information rather than a simultaneous processor. In the latter information is presented all at one time rather than in a sequence. If client's tests are more similar to the latter, for example if the fact patterns are presented all at once and client has to come up with a solution, she will do less well than if she is able to develop a problem sequentially as she would do in her criminal prosecutor role.
>
> Due to the large discrepancy between the verbal and performance abilities, the verbal measure is used as an expectancy of achievement as the Full Scale I.Q. represents a meaningless average. In this regard client's current measures of achievement are not significantly below her measure of expectancy, but the overlays of a learning disability and the learning processing

difficulties still exist. The reader is reminded to once again look at the qualitative behavior observations during the reading tests. Moving one's head rather than to read with her eyes, especially for an individual with some superior abilities, speaks out boldly in terms of the diagnosis of a learning disability. In addition the observable mouthing of words as she reads, supposedly silently, is a further indication of an inefficient and maldeveloped reading process.

Shaw's report made the following recommendation to the Board:
In order to compensate for her disability, unlimited or at least extended time should be granted for the bar examination. This is assuming that the Testing Committee, based upon the new information reported in this examination, would reconsider and allow her to take the test again. *The increased time allowed will grant more opportunity for client to read and reread items in order to give additional input* [emphasis added].

The Shaw report concluded with the observation that Rubenstein's learning disability would not impair her law practice. In fact, the report stated that Rubenstein "has a *1134 facility for the practice of law and is encouraged to pursue that interest." In addition, Rubenstein supported her petition to the Board with a letter from the Deputy Attorney General who had supervised her Rule 55 practice. Her supervisor represented to the Board that Rubenstein's "learning disability had no discernible impact on her ability to practice law in the criminal courts, something the tests cannot show."

Board's 1993 Response

On June 11, 1993, the Board informed Rubenstein that it had granted her petition to take the Delaware Bar Examination for a fourth time. The Board's letter to Rubenstein also stated that based upon the medical evidence of her learning disability, accommodations would be made for her to take the *essay* portions of the examination. Those accommodations consisted of the Board's permission for Rubenstein to take the essay section in a separate room and to have one additional hour for each three-hour essay session. The Board decided that Rubenstein would *not* be permitted additional time for the MBE section. [FN2]

FN2. The Board's decision to permit Rubenstein's application to take the Bar Examination for a fourth time was conditioned upon her acceptance of its decision to grant her additional time only with respect to the essay section. The record reflects that under the circumstances, Rubenstein had no alternative. Rubenstein had requested additional time to take the entire Bar Examination. When confronted with a Hobson's choice by the Board, Rubenstein's acquiescence cannot be fairly construed as a waiver of the right to contend that she should have been given additional time for the MBE.

Rubenstein's 1993 Results

With the accommodation of additional time on the essay section, Rubenstein passed that portion of the 1993 Delaware Bar Examination. However, she received a score of 128 on the MBE, the examination she had passed in 1992 with a score of 137. That score was two points less than the minimum MBE score of 130 required by the rules of the Board. B.R. 52.4(c). Consequently, Rubenstein was informed that she had failed the 1993 Bar Examination.

Rubenstein petitioned the Board. She requested to be certified by the Board as being qualified for admission to the Delaware Bar, notwithstanding the two- point insufficiency of her MBE score in 1993. Rubenstein's petition was considered by the Board. Her petition was denied by the Board in a letter dated November 17, 1993.

Standard of Review
Rubenstein's Contention

[1] Rubenstein has appealed to this Court for relief from the Board's action. Supr.Ct.R. 52. The Board's ruling would prevent Rubenstein from ever gaining admission to the Delaware Bar. Consequently, the Board's denial of Rubenstein's petition has affected her

"substantial rights," as required by Supreme Court Rule 52(f). Therefore, it is appropriate for this Court to consider the merits of Rubenstein's petition for relief.

[2] This Court will not set aside the determination of the Board as to an applicant's professional competence unless the applicant demonstrates fraud, coercion, arbitrariness, or manifest unfairness. *In re Reardon,* Del.Supr., 378 A.2d 614, 618 (1977). Rubenstein does not allege that the Board conducted itself in either a fraudulent or a coercive manner. Rather, she contends that the Board's decision to grant her additional time on the essays but not on the MBE section of the Bar Examination was both arbitrary and manifestly unfair.

Rubenstein argues that the Board's accommodations to her during the 1993 Bar Examination were an unreasonable response to her undisputed learning disability. Rubenstein asserts that she has demonstrated her professional competence by passing the essay section of the Bar Examination in 1993 and the MBE section of the Bar Examination in 1992. Accordingly, Rubenstein asks this Court to direct the Board to suspend the application of Board Rule 52.4(c), which requires an applicant to achieve specified minimum scores on *both* sections of the Delaware Bar Examination in the *same* administration of that test, and to certify her as qualified for admission to the Delaware Bar. *Compare In* ***1135** *re Hudson,* Del.Supr., 402 A.2d 369, 371 (1979).

Delaware Bar Admission
Certification Requirements

[3] No applicant can be certified by the Board as qualified for admission to the Bar of this Court unless he or she has: first, complied with each of the requirements of Supreme Court Rule 52; second, achieved a passing score on the Professional Conduct Examination; and third, achieved a passing score on the Bar Examination. B.R. 52.1. The Board acknowledges that Rubenstein has satisfied each of the requirements of Supreme Court Rule 52 and achieved a passing score on the Professional Conduct Examination. [FN3] Therefore, the only issue before this Court relates to Rubenstein's performance on the Bar Examination.

FN3. The Board does not dispute that Rubenstein is "a person of good moral character and reputation," Supr.Ct.R. 52(a), or that she is qualified for admission to the Delaware Bar in every respect with the exception of her failure to pass both portions of the Bar Examination in one administration. B.R. 52.4(c).

The Bar Examination consists of two sections: the Multistate Bar Examination ("MBE") administered by the National Conference of Bar Examiners and twelve essays on certain enumerated subjects, as determined by the Board. B.R. 52.4(b). "An applicant shall be deemed to have passed the Bar Examination if he [or she] achieves a scaled score of not less than 130 on the MBE and an average of not less than 65.0 on all of the twelve essay questions on the Bar Examination." B.R. 52.4(c). The latter provision is subject to the additional requirement that the applicant "shall not have received a grade of less than 65.0 on more than five of the said essay questions." *Id.*

Rubenstein's Disability
Board's Discretion Exercised
Fourth Application Granted

Rubenstein failed the Bar Examination in three successive years. An applicant, who has failed to pass the Bar Examination three times, seeking to be afforded a fourth opportunity to take that test, has the burden of providing the Board with evidence:
(i) That there existed physical, emotional, or other good reason constituting mitigating circumstances for the applicant's failure to pass 1 or more of the prior examinations; and

(ii) That such reason, or reasons, have been resolved and the applicant knows of no impediment to his preparation for the fourth examination.
B.R. 52.8(e).

The Board was satisfied that the evidence

presented by Rubenstein of her previously undiagnosed learning disability constituted a mitigating circumstance for her failure to pass the Bar Examination in the past. *Id.* This satisfied the Board rule's first requirement "[t]hat there existed physical, emotional, or other good reason constituting mitigating circumstances" for her failure to pass one or more of the prior examinations. B.R. 52(e)(i). Since Rubenstein's learning disability was of a continuing nature, the Board realized that it was impossible for her to attest to its resolution, which is the second requirement of the Board's rule regarding an application to take the Bar Examination for a fourth time. B.R. 52.8(e)(ii).

The Board properly recognized, however, that the continuing nature of Rubenstein's learning disability was not only (1) an improper basis to deny her petition to take the Bar Examination a fourth time but also (2) required it to make reasonable accommodations for her learning disability if she was permitted to take the Bar Examination for the fourth time. The Board decided to give Rubenstein time and one-third to take the essay section of the Bar Examination *but no additional time to take the MBE section.* Our review of the Board's action must necessarily involve a consideration of both the factual evidence presented to the Board and the applicable law.

Bar Examinations
Americans with Disabilities Act

The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C.A. §§ 12101- 12213 ***1136** (West Supp.1993), became effective on January 26, 1992. The United States Department of Justice promulgated regulations to implement the ADA's statutory mandate. 28 C.F.R. pts. 35-36 (1991). The Department of Justice also prepared a section-by-section analysis of its regulations. *Id.* In 1991, prior to the ADA becoming effective, the United States Department of Justice and the Equal Employment Opportunity Commission published the Americans with Disabilities Act Handbook.

The ADA has been described as a "national mandate to provide reasonable accommodations for disabled persons." Morrissey, *The Americans with Disabilities Act: The Disabling of the Bar Examination Process?,* The Bar Examiner, May 1993, at 9, 9. It "imposes new standards of conduct upon bar examiners and similar entities ... with respect to disabled individuals [who are] pursuing professional careers." *Id.* The extent to which the ADA applies to bar examinations has been the subject of recent scholarly analysis. *See* Rogers, *The ADA, Title VII and the Bar Examination: The Nature and Extent of the ADA's Coverage of Bar Examinations,* 36 How.L.J. 1 (1993). The issues that confront **boards** of **bar examiners** in complying with the ADA have also been carefully considered by two special counsel to the National Conference of Bar Examiners. Fedo & Brown, *Accommodating the Disabled Under the ADA: The Issues for Bar Examiners,* The Bar Examiner, Aug. 1992, at 6.

The ADA provides that an individual is disabled if, *inter alia,* he or she has a physical or mental impairment that substantially limits one or more of his or her major life activities. 42 U.S.C.A. § 12102(2). Once such a disability has been established, the ADA generally requires the persons or entities designated by the Act to make reasonable accommodations or modifications for the disability. *See, e.g.,* 42 U.S.C.A. §§ 12112, 12131(2), 12182(b)(2)(A)(ii), 12184(b)(2)(A). Title II of the ADA provides:

> Subject to the provisions of this [title], no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132.

[4][5] Admission to the Delaware bar is governed exclusively by this Court. *In re Hudson,* Del.Supr., 402 A.2d 369 (1979). The application and testing procedures are administered by the Board, which is appointed by this Court. Supr.Ct.R. 51 and 52. The Board, as an instrumentality of this Court,

constitutes a public entity within the meaning of Title II. *See* 42 U.S.C.A. § 12131(1); Supr.Ct.R. 51. *See also* Fedo & Brown, *Accommodating the Disabled Under the ADA: The Issues for Bar Examiners,* The Bar Examiner, Aug. 1992, at 6, 6. Consequently, as a public entity, the Board must make reasonable accommodations to prevent the *de facto* exclusion "which may occur when disabled but otherwise qualified individuals are limited by standard administrative or other operating procedures from participating fully in the examination process." Fedo & Brown, *Accommodating the Disabled Under the ADA: The Issues for Bar Examiners,* The Bar Examiner, Aug. 1992, at 6, 6.

The regulations implementing the ADA state that Title II is applicable to licensing and certification "programs." 28 C.F.R. § 35.130(b)(6). Title II and its regulations, however, contain no specific standards for the *administration* of bar examinations, or of other professional licensing tests. Nevertheless, specific guidance is available regarding the administration of examinations in the regulations promulgated to implement Title III of the ADA. Title III, in part, provides:

> *Any person* that offers examinations or courses related to applications, licensing, certification, or credentialing for secondary or postsecondary education, *professional,* or trade purposes shall offer such examinations or courses in a place and manner accessible to persons with disabilities or offer alternative accessible arrangements for such individuals.

42 U.S.C.A. § 12189 (emphasis added).

Title III of the ADA generally applies only to private entities. However, in the interpretive analysis of its Title III regulations, the United States Department of Justice has taken ***1137** the position that "[e]xaminations covered by this section would include a bar exam." ADA Handbook, III-100, Oct. 1991. [FN4] *See* 28 C.F.R. § 36.309(a). *See also Amicus Curiae* Memorandum of Law for the United States, at 4 n. 2, *Rosenthal v. New York State Bd. of Law Examiners,* (S.D.N.Y. Apr. 13, 1992) (No. 92 Civ. 1100). At least one federal court has agreed with the Department of Justice's construction of the ADA by applying both Title II and III with regard to the administration of a bar examination. *D'Amico v. New York State Bd. of Law Examiners,* 813 F.Supp. 217, 221 (W.D.N.Y.1993). [FN5]

FN4. The Justice Department's analysis also states:

> Section 309 [42 U.S.C.A. § 12189] is intended to fill the gap that is created when licensing, certification, and other testing authorities are not covered by section 504 of the Rehabilitation Act [29 U.S.C.A. § 794] (West Supp.1993) or title II of the ADA. Any such authority that is covered by section 504, because of the receipt of Federal money, or by title II, because it is a function of State or local government, must make all of its programs accessible to persons with disabilities, which includes physical access *as well as modifications in the way the test is administered, e.g., extended time....*

Id. (emphasis added).

FN5. In *D'Amico,* the court pointed out that the ADA defines the term "person" as used in the examination and courses provision of Title III as having the same meaning given the term in Section 701 of the Civil Rights Act of 1964. *Id.* (citing 42 U.S.C. § 12111(7)). In the Civil Rights Act, "person" is defined as including governments and governmental agencies. *Id.* (citing 42 U.S.C. § 2000e(a)).

Additional Time
A Reasonable Accommodation

[6] The purpose of the ADA "is to place those with disabilities on an equal footing and not to give them an unfair advantage." *D'Amico v. New York State Bd. of Law Examiners,* 813 F.Supp. at 221. *Compare Southeastern Community College v. Davis,* 442 U.S. 397, 413, 99 S.Ct. 2361, 2370, 60 L.Ed.2d 980 (1979) (Section 504 of the Rehabilitation Act of 1973). [FN6] The integrity of the examination process has been an important consideration for the federal courts in reviewing the reasonableness of accommodations made by testing authorities pursuant to other disabilities legislation. *See, e.g., Pandazides v. Virginia Bd. of Educ.,* 752 F.Supp. 696, 697 (E.D.Va.1990), *rev'd and remanded,* 946 F.2d 345 (4th Cir.1991). The ADA also provides authority, for example, that a testing authority may refuse to provide an auxiliary

aid or service to a disabled person if it meets the burden of establishing "that offering [the] particular auxiliary aid would fundamentally alter the measurement of the skills or knowledge the examination is intended to test or would result in an undue burden." 28 C.F.R. § 36.309(b)(3) (1991).

FN6. The position of the United States Department of Justice, stated in the ADA Handbook, is that the standards of Title V of the Rehabilitation Act of 1973 will apply unless the ADA or its regulations explicitly adopts a different standard. ADA Handbook, II-11, III-12, Oct. 1991. *See* 28 C.F.R. §§ 35.103(a), 36.103(a) (1991). *See also* 42 U.S.C.A. § 12201(a) ("[N]othing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973.").

[7] A learning disability, such as Rubenstein's, is a condition which the ADA recognizes should be accommodated. 28 C.F.R. §§ 35.104(1)(i), 36.104(1)(i). The regulations promulgated under Title III describe several kinds of accommodations that may be required in the examination process, as well as the limitations on such accommodations that may be applicable. 28 C.F.R. § 36.309 (1991). Those regulations specifically state that "[r]equired modifications to an examination may include changes in the *length of time* permitted for completion of the examination." 28 C.F.R. § 36.309(b)(2) (emphasis added).

The record reflects that the Board found that Rubenstein had established that she was a person with a learning disability. The ADA Handbook provides that "[e]xaminers may require evidence that an applicant is entitled to modifications." ADA Handbook, III-102, Oct. 1991. The ADA Handbook suggests that appropriate documentation for a requested accommodation "might include a letter from a physician or *other professional.*" *Id.* (emphasis added).

In this case, Rubenstein requested the Board to accommodate her learning disability by allowing her additional time to take the ***1138** Bar Examination. She documented her request with Shaw's expert report. Shaw's report made the following recommendation to the Board:

In order to compensate for her disability, unlimited or at least extended time should be granted for the bar examination. This is assuming that the Testing Committee, based upon the new information reported in this examination, would reconsider and allow her to take the test again. *The increased time allowed will grant more opportunity for client to read and reread items in order to give additional input* [emphasis added].

Shaw's report recommended that Rubenstein be afforded additional time to take the Bar Examination. Shaw's professional recommendation was unqualified. It did not differentiate between the essay section and the MBE section of the Bar Examination with respect to Rubenstein's need for additional time to accommodate her learning disability.

Time Afforded Rubenstein
An Inconsistent Accommodation

This Court has held that appellate review regarding an exercise of the Board's discretion requires a determination that the factual findings are supported by the record and that the Board's decision is the product of a logical and orderly deductive process. *In re Green,* Del.Supr., 464 A.2d 881, 887 (1983). It has been observed that the *sine qua non* for bar examiners' compliance with the ADA "[is] principally a matter of making reasonable accommodations for disabled individuals to take the examination and to communicate with the licensing board." Fedo & Brown, *Accommodating the Disabled Under the ADA: The Issues for Bar Examiners,* The Bar Examiner, Aug. 1992, at 6, 6-7. The same authors astutely note that courts are more likely to uphold bar examiners' decisions if they produce an evidentiary record showing that reasonable efforts were made to accommodate a disabled applicant's needs. *Id.* at 8. *Accord Petition of Nenno,* Del.Supr., 472 A.2d 815, 818 (1983) (Board's decision must be supported by substantial evidence).

In Rubenstein's case, the record is devoid of any evidentiary basis to support the Board's

decision to disregard the recommendation of Rubenstein's expert. In addition, the Board's ultimate decision does not reflect that it was the product of an orderly and logical deductive process. *In re Green,* 464 A.2d at 887. The Board's decision to afford Rubenstein additional time (one-third) to take the essay section but no additional time to take the MBE section of the Bar Examination, without any explanation, was internally inconsistent. The Board's action was also inconsistent with the MBE guidelines established by the National Conference of Bar Examiners.

Multistate Bar Examination
Task Force on Disabled Applicants

The MBE portion of the Delaware Bar Examination is "administered by the National Conference of Bar Examiners." B.R. 52.4(b). In October 1990, the Board of Managers of the National Conference adopted the following revision to Standard 22 of the Code of Recommended Standards for Bar Examiners:

> Without impairing the integrity of the examination process, the bar examining authority should adopt and publish procedures allowing applicants with documented disabilities to have assistance, equipment or additional time as is reasonably necessary under the circumstances to assure their fair and equal opportunity to perform on the examination.

Smith, *NCBE Guidelines For Testing Disabled Applicants,* The Bar Examiner, Feb. 1991, at 28, 28. The revision to Standard 22 was proposed by the National Conference of Bar Examiners Task Force on Disabled Applicants. *Id.* That Task Force also developed "guidelines for jurisdictions reviewing requests for special accommodations for disabled applicants," i.e. *Considerations in Testing Applicants with Disabilities. Id.*

The work of the Task Force was reported upon by Jane Peterson Smith, the Director of Testing of the National Conference of Bar Examiners. *Id.* According to Smith:

> *1139 The most difficult issue the task force considered was the amount of extra time to allow for disabled applicants, particularly for those with learning disabilities. The task force concluded that time and one-half was an appropriate accommodation for most disabled applicants because there is evidence that the Multistate Bar Examination (MBE) is not a "speeded" examination.

The Task Force on Disabled Applicants also designed a standardized application form for bar examiners to use for those persons requesting testing accommodations. *Id.* at 30-31 (Appendix I and II). That form is particularly instructive in Rubenstein's case. The choices in Section V, "Accommodations granted for the Multistate Bar Examination," regarding "[e]xtra testing time" are: time and one-half; double time; more than double time; and other. (Appendix II). The form also includes a separate Section VI, which relates to "[a]ccommodations granted for the rest of the bar examination," e.g., the essays. *Id.*

Board's Decision
Manifestly Unfair

The regulations implementing the ADA recognize additional time for taking the examination as one of the specific accommodations which should be made for bar applicants with a learning disability. After careful consideration, the Task Force on Disabled Applicants of the National Conference of Bar Examiners concluded that *time and one-half* to take the MBE was an appropriate accommodation for most applicants with learning disabilities. The Board's decision to deny Rubenstein additional time to take the MBE in 1993 is inconsistent with the recommendations of Rubenstein's expert, the ADA regulations, and the conclusions of the National Conference of Bar Examiners' Task Force on Disabled Applicants.

[8] The fact that Rubenstein passed the MBE in 1992 without additional time, notwithstanding her then undiagnosed learning disability, did not constitute a rational basis for denying her additional time to take the MBE in 1993, after her learning disability became known. Although this Court recognizes the exemplary and professional manner in which the Board

generally discharges its important responsibilities, the Board's decision to deny Rubenstein *any* additional time to take the MBE portion of the 1993 Bar Examination was not supported by the record. That decision was not the product of a logical deductive reasoning process and was manifestly unfair to Rubenstein.

Equitable Remedy
Rubenstein's Petition Granted

[9] Having determined that the Board's decision to deny Rubenstein any additional time to take the MBE portion of the 1993 Bar Examination was manifestly unfair, this Court must consider an appropriate and equitable remedy. Since Rubenstein passed the essay portion of the Bar Examination in 1993, when her learning disability was properly accommodated with additional time to take that test, it would be inequitable to require her to take that section of Bar Examination again. If Rubenstein was permitted to retake only the MBE portion of the Bar Examination, with additional time, this Court would have to direct a waiver of the requirement that the essay and MBE sections both be passed in one sitting. B.R. 52.4(c). *In re Hudson,* Del.Supr., 402 A.2d 369, 371 (1979). The record reflects, however, that Rubenstein has already demonstrated her ability to pass the MBE section of the Bar Examination in a separate sitting, notwithstanding her disability, in 1992.

The Bar Examination tests for minimal competence to practice law. *In re Reardon,* Del.Supr., 378 A.2d 614, 617 (1977). Rubenstein has demonstrated her competence to practice law by passing both the essay section and the MBE section of the Bar Examination, albeit on separate occasions. *See* B.R. 52.4(c). Rubenstein's competence to practice law has also been attested to by the members of the Delaware Judiciary she practiced before pursuant to Rule 55, the Attorney General, and other members of the Delaware Bar who are familiar with her legal abilities. *Accord Petition of Golby,* Del.Supr., 375 A.2d 1049, 1050 (1977).

***1140** The relief requested in Rubenstein's petition implicates Board Rule 52.4(c), which implements "one aspect of this Court's exclusive right to govern the practice of law--the admission of persons to the Bar." *Petition of Nenno,* Del.Supr., 472 A.2d 815, 819 (1983). This Court alone is responsible for such matters. *Id.* We have concluded that, under the unique and limited circumstances here, Rubenstein's petition properly invokes this Court's inherent authority to suspend the requirement of Board Rule 52.4(c) that both sections of the Bar Examination be passed during one sitting. [FN7] Such action does not compromise either the integrity of the administration or the high standards of the Delaware Bar Examination. *Compare In re Hudson,* Del.Supr., 402 A.2d 369, 371 (1979); *In re Fischer,* Del.Supr., 425 A.2d 601, 602 (1980). Nor do we intend any criticism of the Board, which attempted in good faith to comply with the evolving standards of the ADA. Our ruling simply represents the correction of manifest unfairness under unusual circumstances involving an applicant who has exhausted every remedy available to her.

FN7. Nothing in this opinion should be construed as a repudiation of the reasonableness of the general requirement that both the essay and MBE portions of the examination should be passed at the same administration, particularly in order to prevent sequential concentration on one portion of the examination by "locking away" one portion of the examination in one year and concentration on the other portion in a following year. *In re Hudson,* Del.Supr., 402 A.2d 369, 371 (1979).

Conclusion

Under the facts and circumstances of Rubenstein's case, equitable principles of justice require that the manifest unfairness to Rubenstein be remedied by granting her application for relief from the Board's actions. Therefore, under this Court's exclusive authority with respect to applications for admission to the Delaware Bar, the simultaneous passage requirements of Board Rule 52.4(c) are waived. The Board is directed to deliver to Rubenstein the

certificate required by Supreme Court Rule 52(e). The mandate shall issue forthwith.

*1141 APPENDIX I

BAR EXAMINATION ACCOMMODATIONS FOR EXAMINEES WITH DISABILITIES
ELIGIBILITY QUESTIONNAIRE

I. *Disability Status (check all that apply)*

A. Are you:
☐ deaf? ☐ hard of hearing?
☐ blind? ☐ visually impaired?

B. Do you have a:
☐ physical disability?
Please explain_____
☐ specific learning disability?
Please explain_____
☐ psychological disability?
Please explain_____

C. How long have you had your disability?
☐ Most of my life
☐ 1 year ☐ 2 years ☐ 3 years ☐ 4 years ☐ 5 years or more

PLEASE INCLUDE CURRENT DOCUMENTATION FROM A DOCTOR, PSYCHOLOGIST, PSYCHIATRIST OR OTHER APPROPRIATE PROFESSIONAL CERTIFYING YOUR DISABILITY.

II. *Past Accommodations Made for Your Disability*

A. In high school:
Were you in a special school or program? Yes ☐ No ☐
Did you get special accommodations for classroom tests? Yes ☐ No ☐
Did you generally get extra time for classroom tests? Yes ☐ No ☐

B. Did you have special accommodations for taking the SAT or ACT examinations for admission to college? Yes ☐ No ☐

C. In college:
Did you use disabled student services? Yes ☐ No ☐
Did you generally get extra time for exams? Yes ☐ No ☐

D. Did you have special accommodations for the LSAT? Yes ☐ No ☐
If yes, what accommodations? (Check all that apply)
Formats:
☐ Braille ☐ Tape ☐ Large type
Help:
☐ Reader ☐ Recorder ☐ Sign language interpreter
☐ Extra breaks/rest periods
☐ Extra testing time
☐ Other
Please explain_____

E. In law school:
Did you use disabled student services? Yes ☐ No ☐
Did you generally get extra time for exams? Yes ☐ No ☐

PLEASE INCLUDE DOCUMENTATION OF SPECIAL SERVICES AND TESTING ACCOMMODATIONS YOU RECEIVED IN LAW SCHOOL BECAUSE OF YOUR DISABILITY.

III. *I certify the above statements to be true.*
(Signed)_____(ID#)_____

[illegible] SEE OTHER SIDE.

*1142

IV. Accommodations Requested for the Bar Examination. (Check all that apply)

Formats:
☐ Braille ☐ Tape ☐ Large type ☐ Regular

Help:
☐ Reader ☐ Recorder ☐ Sign language interpreter

☐ Extra breaks/rest periods
☐ Extra testing time. How much testing time? (Check below.)
☐ Time and a half ☐ Double time ☐ More than double time

☐ Other
Please explain_____

IN A SEPARATE LETTER, PLEASE DESCRIBE YOUR SPECIFIC DISABILITY, WHEN AND HOW IT WAS FIRST IDENTIFIED, AND THE ACCOMMODATIONS YOU ARE REQUESTING BECAUSE OF IT. MAIL THIS LETTER, THIS FORM, AND THE REQUESTED DOCUMENTATION TO:

NAME AND ADDRESS HERE

APPENDIX II

Applicant, please do not use the space below. For Bar Examiner use only.

V. Accommodations granted for the Multistate Bar Examination.

Formats:
☐ Braille ☐ Tape ☐ Large type ☐ Regular

Help:
☐ Reader ☐ Recorder ☐ Sign language interpreter

☐ Extra breaks/rest periods
☐ Extra testing time. How much testing time? (Check below.)
☐ Time and a half ☐ Double time ☐ More than double time

☐ Other
Please explain_____

VI. Accommodations granted for the rest of the bar examination

Describe _____

VII. Identification

Test date_____
Test location_____
Test form_____

END OF DOCUMENT

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In re Petition of Maureen DELANEY To the Delaware Bar (Applicant No. 68).

No. 447,1993.

Submitted: Jan. 18, 1994.
Decided: Feb. 4, 1994.

PETITION REFUSED.

Before VEASEY, Chief Justice, and MOORE and WALSH, Justices.

ORDER

MOORE, Justice.

1 1) Maureen Delaney ("Delaney") has petitioned this Court, pursuant to Supreme Court Rule 52(f), for relief from the denial of her request that the **Board of **Bar Examiners** ("the Board") reconsider her grades on the July, 1993 Delaware Bar Examination.

2) This is the first time that Delaney has sat for and failed the Delaware Bar Examination. The Board carefully graded Delaney's answers to the essay portion of the examination, giving her an average score of 62.5%. After a second and third review of her answers, the Board raised her average to 64.25%. The Board requires that all applicants to the Delaware Bar receive at least a 65.0% average on the essay portion. Therefore, Delaney was notified that she failed and her request for a reconsideration of her responses was denied.

3) This Court will not set aside the determination of the Board as to an applicant's professional competence unless the applicant shows fraud, coercion, arbitrariness or manifest unfairness. *In re Reardon,* Del.Supr., 378 A.2d 614, 618 (1977) (citing *Hooban v. Board of Governors,* Wash.Supr., 539 P.2d 686 (1975)). Furthermore, the applicant must show that the Board's actions affect the "substantial rights" of the applicant. Supr.Ct. Rule 52(f). Because Delaney has not been denied the ultimate right to sit for the Delaware Bar Examination another two times, she has failed to show that her substantial rights have been affected by the Board's actions. *In re Leach,* Del.Supr., No. 197, 1986, Moore, J. (Jun. 25, 1986) (ORDER).

NOW, THEREFORE, IT IS ORDERED pursuant to Supreme Court Rule 52(f) that the within petition be, and the same hereby is,

REFUSED.

637 A.2d 826 (Table), 1994 WL 35489 (Del.Supr.), Unpublished Disposition

END OF DOCUMENT

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In re Petition of Mitchell C. DULING To the Delaware Bar (Applicant No. 102).

No. 469,1993.

Submitted: Jan. 6, 1994.
Decided: Feb. 4, 1994.

PETITION REFUSED.

Before VEASEY, Chief Justice, and MOORE and WALSH, Justices.

ORDER

MOORE, Justice.

1 1) Pursuant to Supreme Court Rule 52(f), Mitchell C. Duling ("Duling") has petitioned this Court seeking a reversal of the decision of the **Board of **Bar Examiners** ("Board") denying his request for a reconsideration of his scores on the July 1993 Delaware Bar Examination.

2) This is the third time Duling has sat for and failed the Delaware Bar Examination. The 1993 Delaware Bar Examination, as administered by the Board, consisted of the Multistate Bar Examination (MBE), twelve essay questions prescribed by Board Rule 52.4 ("BR-52.4"), and the Professional Conduct Examination.

3) BR-52.4 provides that in order for an applicant to pass the Bar Examination, he/she must achieve a score of not less than 130 on the MBE and an average of not less than 65.0 on all of the twelve essay questions, provided that the applicant shall not have received a grade of less than 65.0 on more than five of the essay questions. Duling passed the MBE with a score of 130, but achieved an average score of 62.08 on the twelve essay questions, and an average score of 61.25 on the four Professional Conduct essay questions. Based on these scores, the Board determined that Duling failed both the Bar Examination and the Professional Conduct Examination. The Board notified Duling that he had failed the 1993 Delaware Bar Examination on October 7, 1993.

4) Duling subsequently petitioned the Board to review his answers on the Bar and Professional Conduct Examinations. The Board reviewed Duling's answers and, despite increasing the grading of one answer, found that his average score still did not meet or exceed the 65.0 requirement. The Board therefore denied Duling's petition and notified him accordingly by letter dated November 17, 1993. [FN1]

5) Supreme Court Rule 52(f) requires an applicant to demonstrate that the Board's actions affect his "substantial rights" before this Court will consider his petition for relief. Here, Duling has demonstrated that the Board's refusal to reconsider his exam grades has affected his substantial rights since, due to his failure to pass the exam a third time and, except as provided in BR-52.8(e), he cannot again sit for the Delaware Bar Examination.

6) This Court will not set aside the determination of bar examiners as to an applicant's legal proficiency unless the applicant shows fraud, coercion, arbitrariness or manifest unfairness in the decision. *In re Reardon,* Del.Supr., 378 A.2d 614, 618 (1977) (citing *Hooban v. Board of Governors,* Wash.Supr., 539 P.2d 686 (1975)). Duling's only assertion regarding impropriety on the part of the Board is that in their letter of November 17, 1993, they "stated no reason for the denial" of his request for reconsideration. *See Appellant's Petition for Relief* at 2. This does not demonstrate fraud, coercion, arbitrariness or manifest unfairness.

NOW, THEREFORE, IT IS ORDERED pursuant to Supreme Court Rule 52(f) that the within petition be, and the same hereby is,

**2 REFUSED.

FN1. The Board's denial of Duling's petition to reconsider his grades despite the fact that it did in fact reconsider his grades is a clear inconsistency. However this inconsistency does not amount to fraud, coercion, arbitrariness or manifests unfairness as is required for a reversal of the Board's decision. *See In re Reardon,* Del.Supr., 378 A.2d 614, 618 (1977).

637 A.2d 826 (Table), 1994 WL 35505 (Del.Supr.), Unpublished Disposition

END OF DOCUMENT

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In re Petition of Thomas P. CONATY, IV to the Delaware Bar (Applicant No. 91).

No. 455, 1993.

Submitted: Dec. 21, 1993.
Decided: Jan. 4, 1994.

REFUSED.

Before VEASEY, C.J., and MOORE and WALSH, JJ.

ORDER

MOORE, Justice.

**1 This 4th day of January, 1994, it appearing that:

1) Thomas P. Conaty, IV ("Conaty") has petitioned this Court, pursuant to Supreme Court Rule 52(f), for relief from the denial of his request that the **Board** of **Bar Examiners** ("the Board") reconsider his grades on the July, 1993 Delaware Bar Examination.

2) This is the first time that Conaty has sat for and failed the Delaware Bar Examination. The Board carefully graded Conaty's answers to the essay portion of the examination, giving him an average score of 60.42%. After a second and third review of his answers, the Board raised his average to 60.83%. The Board requires that all applicants to the Delaware Bar receive at least a 65.0% average on the essay portion. Therefore, Conaty was notified that he failed and his request for a reconsideration of his responses was denied.

3) This Court will not set aside the determination of the Board as to an applicant's professional competence unless the applicant shows fraud, coercion, arbitrariness or manifest unfairness. *In re Reardon,* Del.Supr., 378 A.2d 614, 618 (1977) (citing *Hooban v. Board of Governors,* Wash.Supr., 539 P.2d 686 (1975)). Furthermore, the applicant must show that the Board's actions affect the "substantial rights" of the applicant. Supr.Ct.Rule 52(f). Because Conaty has not been denied the ultimate right to sit for the Delaware Bar Examination a third time, he has failed to show that his substantial rights have been affected by the Board's actions. *In re Leach,* Del.Supr., No. 197, 1986, Moore, J. (Jun. 25, 1986) (ORDER).

NOW, THEREFORE, IT IS ORDERED pursuant to Supreme Court Rule 52(f) that the within petition be, and the same hereby is,

REFUSED.

637 A.2d 826 (Table), 1994 WL 10821 (Del.Supr.), Unpublished Disposition

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(Cite as: 637 A.2d 829, 1994 WL 10809 (Del.Supr.))
< KeyCite History >

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In re Petition of Sharon Ann ZIEGLER to The Delaware Bar (Applicant No. 42).

No. 438, 1993.

Submitted: Dec. 15, 1993.
Decided: Jan. 3, 1994.

REMANDED.

Before VEASEY, C.J., and MOORE and WALSH, JJ.

ORDER

MOORE, Justice.

**1 This 3rd day of January, 1994, it appearing that:

1) Sharon Ann Ziegler ("Ziegler") has petitioned this Court, pursuant to Supreme Court Rule 52(f), for relief from the denial of her request that the **Board** of **Bar Examiners** ("the Board") reconsider her grades on the July, 1993 Delaware Bar Examination. Ziegler has further moved for an order compelling the Board to comply with certain discovery requests.

2) This is the second time that Ziegler has sat for and failed the Delaware Bar Examination. The Board carefully graded Ziegler's answers to the essay portion of the examination, giving her an average score of 62.5%. After a second and third review of her answers, the Board raised her average to 63.75%. The Board requires that all applicants to the Delaware Bar receive at least a 65.0% average on the essay portion. Therefore, Ziegler was notified that she failed and her request for a reconsideration of her responses was denied.

3) This Court will not set aside the determination of the Board as to an applicant's professional competence unless the applicant shows fraud, coercion, arbitrariness or manifest unfairness. *In re Reardon,* Del.Supr., 378 A.2d 614, 618 (1977) (citing *Hooban v. Board of Governors,* Wash.Supr., 539 P.2d 686 (1975)). Furthermore, the applicant must show that the Board's actions affect the "substantial rights" of the applicant. Supr.Ct.Rule 52(f). Because Ziegler has not been denied the ultimate right to sit for the Delaware Bar Examination for a third time, she has failed to show that her substantial rights have been affected by the Board's actions. *In re Leach,* Del.Supr., No. 197, 1986, Moore, J. (Jun. 25, 1986) (ORDER). Therefore, Ziegler has failed to bring even a colorable claim in her petition.

4) Ziegler's request for discovery must also be refused, because she has failed to make any showing of impropriety by the Board. In the absence of any such showing, petitioner is not entitled to "explore for it among the Board's administrative processes." *In re Petty,* Del.Supr., 410 A.2d 1021, 1024 (1980).

5) Finally, the Court notes with much concern a matter that may reflect adversely on the applicant's understanding of her professional responsibility. She is a member of the Pennsylvania Bar, and seeks to support her appeal by excerpts from a transcript of a telephone conversation she initiated with Board member Michael J. Rich, Esq. That conversation was surreptitiously recorded by the applicant without Mr. Rich's knowledge or consent. While technically legal in Delaware, such conduct is professionally improper. *See Kaplan v. Wyatt,* Del.Ch., C.A. No. 6361, Brown, Ch. (Jan. 18, 1984), citing ABA Committee on Ethics and Professional Responsibility, Formal Opinion 337 (1974). The ABA opinion, upon which the Court of Chancery relied, holds that, with the exception of prosecutors, it is unethical for a lawyer to tape record a conversation without the prior knowledge or consent of all the

parties to the conversation. The essence of Formal Opinion 337 was well articulated by the Colorado Supreme Court:

> **2 Inherent in the undisclosed use of a recording device is an element of deception, artifice, and trickery which does not comport with the high standards of candor and fairness by which all attorneys are bound. *People v. Selby,* Colo.Supr., 606 P.2d 45, 47 (1979).

Those principles of candor and fairness are among the hallmarks of the character requirements one must meet to qualify for admission to the Delaware Bar. *In re John J. Green, Jr.,* Del.Supr., 464 A.2d 881 (1983). There, we stated:

> Good moral character has many attributes, but none are more important than honesty and candor. The burden of establishing this requirement rests and remains with the applicant throughout every stage of the admissions process; and it includes an unremitting duty of candor to all persons charged with investigating and passing upon the applicant's qualifications.

Id. at 885; see also Rule 52(a)(1) and BR-52.3.

(6) In view of the foregoing, the matter must be remanded to the **Board of Bar Examiners** for a thorough investigation into the applicant's character and fitness.

(7) Moreover, we find that the surreptitiously taped excerpts from the conversation with a member of the Board totally fail to support the applicant's petition.

NOW, THEREFORE, IT IS ORDERED pursuant to Supreme Court Rule 52(f) that the within petition be, and the same hereby is, REFUSED. The matter is REMANDED to the Board for further proceedings consistent with the foregoing.

637 A.2d 829 (Table), 1994 WL 10809 (Del.Supr.), Unpublished Disposition

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(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.

In re Petition of Christopher R. LOCKE to the Delaware Bar (Applicant No. 39).

No. 460, 1993.

Submitted: Dec. 21, 1993.
Decided: Dec. 30, 1993.

REFUSED.

Before VEASEY, C.J., and MOORE and WALSH, JJ.

ORDER

MOORE, Justice.

**1 This 30th day of December, 1993, it appearing that:

1) Christopher R. Locke ("Locke") has petitioned this Court, pursuant to Supreme Court Rule 52(f), from the denial of his request that the **Board** of **Bar Examiners** ("the Board") reconsider his grades on the July 1993 Delaware Bar Examination.

2) This is the third time that Locke has sat for and failed the Delaware Bar Examination. The Board carefully graded Locke's answers to the essay portion of the examination, giving him an average score of 60.42%. Locke was then notified that he had failed the bar examination. After Locke's petition for a review of his essay answers, the Board raised his average to 60.58%. The Board requires that all applicants to the Delaware Bar receive at least a 65.0% average on the essay portion. Therefore, the Board denied Locke's petition for reconsideration.

3) For this Court to consider a bar applicant's petition pursuant to Supreme Court Rule 52(f) , the applicant must show that the Board's actions affect the "substantial rights" of the applicant. Supr.Ct.Rule 52(f). In this case, Locke has shown that his substantial rights have been affected because he has failed the bar examination for a third time, and except as provided in BR-52.8(e) cannot again sit for the bar in Delaware.

4) However, this Court cannot set aside the determination of the Board as to an applicant's professional competence unless the applicant shows fraud, coercion, arbitrariness or manifest unfairness. *In re Reardon,* Del.Supr., 378 A.2d 614, 618 (1977) (citing *Hooban v. Board of Governors,* Wash.Supr., 539 P.2d 686 (1975)). Locke has failed to make any such showing.

NOW, THEREFORE, IT IS ORDERED pursuant to Supreme Court Rule 52(f) that the within petition be, and the same hereby is,

REFUSED.

639 A.2d 74 (Table), 1993 WL 557931 (Del.Supr.), Unpublished Disposition

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